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In Search of a Legislative Leviathan: Judicial Enforcement of Senate Nominations Rules

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IN SEARCH OF A LEGISLATIVE LEVIATHAN: JUDICIAL ENFORCEMENT OF SENATE NOMINATIONS RULES

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ABSTRACT

The Senate is trapped in a collective action problem. Both political parties would be better off if the Senate could consistently confirm judicial nominees on a reasonable timeline. However, when the party that controls the presidency does not control the Senate, Senate leaders face strong incentives to block nominees using whatever excuse they can find. Any Senate majority considering playing nice with a president of the opposing party runs the risk that its kindness will not be repaid when the tables are turned. The only rational strategy is to apply what scholars have called the Iron Rule: do unto others before others have the chance to do unto you.

In many situations, individuals or institutions can address a collective action problem by committing to engage in socially optimal behavior, and allowing a third party, like the courts, to enforce their agreement. However, the conventional wisdom is that senators cannot. Courts, it is assumed, will decline to decide cases that allege violations of internal Senate rules. By this logic, the Senate's dilemma can be addressed only by senators themselves. If that leads to suboptimal outcomes, so be it.

This Article argues that the conventional wisdom is wrong. As a matter of constitutional law and constitutional principle, courts should hear cases that involve violations of Senate nominations rules when the Senate so authorizes. The Article begins by articulating a hypothetical nominations rule that could improve the status quo, but is unlikely to be adopted unless it can be enforced by some entity external to the Senate. It then reviews the case law governing judicial enforcement of Senate rules, and related questions, which suggests that courts have a duty to decide cases that turn on nominations rules. Finally, the Article makes the counter-intuitive claim that, whereas judicial action is generally associated with "counter-majoritarian" interference in the affairs of the political branches, judicial enforcement of Senate nominations rules facilitates democratic governance by enabling the American people to build a better process for staffing the courts.

INTRODUCTION

On September 18, 2020, Senate Judiciary Committee Chairman Lindsey Graham had a decision to make. Justice Ruth Bader Ginsburg had died, and President Trump

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had announced he would move to fill her seat with less than two months to go before the November election. Four years earlier, when President Obama nominated Judge Merrick Garland to the Court, Senator Graham had backed his party's decision to ignore the nomination.[1] In a speech to the Judiciary Committee, Graham clarified that Republicans were setting a new "precedent" under which the Senate would not consider Supreme Court nominees in a presidential election year.[2] He invited listeners to "use [his] words against him" if he did not abide by this new precedent when his party controlled the Senate.

After Ginsburg's death, Graham was in exactly the position he had described four years earlier. As Judiciary Committee Chairman, he would decide whether to follow the Garland precedent. He decided against.

Graham justified his actions not just in terms of what he was doing, but in terms of what Democrats would do in similar circumstances. In a letter to Judiciary Committee Democrats, Graham wrote that he would fill the Ginsburg seat because "if the shoe were on the other foot, you would do the same."[3] Graham was articulating what has since been described as the "Iron Rule"[4]: elected officials have a right and responsibility to violate political norms if their opponents would do the same under comparable circumstances.[5] To do otherwise would be to hand lawmaking power to a ruthless opponent.

Whatever one thinks of Graham's actions or justifications, one part of his reasoning has not been questioned. Graham was right that if Democrats chose to violate Senate norms to move a Supreme Court nominee, nothing would stop them.

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[1] Grace Segers, *Lindsey Graham Says He Supports Filling Ruth Bader Ginsburg's Seat Ahead of the Election*, CBS NEWS (Sept. 19, 2020, 3:26 PM), https://www.cbsnews.com/news/lindsey-graham-indicates-he-supports-filling-ruth-bader-ginsburgs-seat-ahead-of-the-election/ [https://perma.cc/FWW2-WHV7].

[2] *Senate Judiciary Committee Business Meeting* (C-SPAN television broadcast Mar. 19, 2016); Kaelan Deese, *Video of Lindsey Graham Arguing Against Nominating a Supreme Court Justice in an Election Year*, THE HILL (Sept. 19, 2020, 5:33 PM), https://thehill.com/homenews/media/517247-video-of-lindsey-graham-arguing-against-nominating-a-supreme-court-justice-in/ [https://perma.cc/8EYT-B3A6].

[3] Letter from Sen. Lindsey Graham, Sen. Judiciary Comm. Chair, to Sens. Feinstein, Leahy, Durbin, Whitehouse, Klobuchar, Coons, Blumenthal, Hirono, Booker, and Harris (Sept. 21, 2020), https://www.judiciary.senate.gov/imo/media/doc/Hearing%20Letter%20Response%2009.21.2020.pdf [https://perma.cc/733T-TKH4].

[4] Jacob Bronsther & Guha Krishnamurthi, *The Iron Rule*, 42 CARDOZO L. REV. 2889, 2891 (2021). Actions based on the Iron Rule can be seen as a form of "constitutional hardball"—in that they challenge not constitutional rules but "pre-constitutional" norms that are basic and generally unchallenged underpinnings of the constitutional regime. *See* Mark Tushnet, *Constitutional Hardball*, 37 J. MARSH. L. REV. 523, 523 n.2 (2004).

[5] A similar argument was made by some Democrats when the Senate used the "nuclear option" in 2013. *See* Paul Waldman, *Don't Believe the Republican Cries of Vengeance*, AM. PROSPECT (Nov. 21, 2013), https://prospect.org/power/believe-republican-cries-vengeance/ [https://perma.cc/AB4L-424U].

Republicans appear to have paid no political price for the steps they took to block the Garland nomination.[6] For all the outrage among Democrats, voters used the next election to hand Republicans control of both houses of Congress and the presidency.[7] Graham's own electoral fortunes tell a similar story. A Quinnipiac University poll conducted days before Ginsburg's death showed Graham tied with his Democratic opponent, and every poll in August and September found his race within the margin of error.[8] After Graham's opponents invested heavily in telling South Carolina voters that Graham had broken his word, his polling numbers improved steadily.[9] He won by more than ten points.[10]

If voters do not punish politicians for violating institutional norms, can anything be done to enforce those norms? The conventional answer, reflected in Graham's comments after deciding to move the Barrett nomination, is no.[11] This conclusion

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[6] Michael J. Gerhardt & Richard W. Painter, *Majority Rule and the Future of Judicial Selection*, 2017 WIS. L. REV. 263, 274 (2017); Ron Elving, *What Happened with Merrick Garland in 2016 and Why It Matters Now*, NPR (June 29, 2018, 5:00 AM), https://www.npr.org/2018/06/29/624467256/what-happened-with-merrick-garland-in-2016-and-why-it-matters-now [https://perma.cc/L8LW-3EHA]. Not only is there little evidence that voters punished Republicans for refusing to consider Garland, there is evidence that the existence of an open Supreme Court seat during the 2016 election helped Donald Trump. Jane Coaston, *Polling Data Shows Republicans Turned Out for Trump in 2016 Because of the Supreme Court*, VOX (June 29, 2018, 10:00 AM), https://www.vox.com/2018/6/29/17511088/scotus-2016-election-poll-trump-republicans-kennedy-retire [https://perma.cc/9ZEG-9VWF].

[7] Elving, *supra* note 6; *House Election Results: G.O.P. Keeps Control*, N.Y. TIMES, https://www.nytimes.com/elections/2016/results/house [https://perma.cc/BY3K-9F42] (last updated Sept. 13, 2017, 3:24 PM).

[8] *Latest Polls*, FIVETHIRTYEIGHT, https://projects.fivethirtyeight.com/polls/senate/south-carolina/ [https://perma.cc/K4TQ-N9K7] (last updated Oct. 22, 2022, 11:20 AM).

[9] *See id.*

[10] *South Carolina U.S. Senate Election Results*, N.Y. TIMES, https://www.nytimes.com/interactive/2020/11/03/us/elections/results-south-carolina-senate.html [https://perma.cc/94H8-KSYT] (updated Mar. 6, 2021). This is not to say that Senator Graham's response to the Ginsburg vacancy necessarily helped him politically. It would be extremely difficult (and maybe impossible) to identify the impact of Graham's actions with respect to the Court, as distinct from his other actions during the same period and other political trends in South Carolina and nationally. I have seen no effort to do so. However, working politicians are unlikely to demand social scientific certainty. Graham's story sends a message to other politicians to be skeptical of claims that voters will punish lawmakers for using hardball tactics in judicial nominations fights.

[11] The conventional wisdom is more often assumed than articulated. Those law professors who have discussed the question have done so in passing. *See* JOSH CHAFETZ, DEMOCRACY'S PRIVILEGED FEW: LEGISLATIVE PRIVILEGE AND DEMOCRATIC NORMS IN THE BRITISH AND AMERICAN CONSTITUTIONS 59 (2007); Michael J. Gerhardt, *The Federal Appointment Process*, *in* CONGRESS AND THE CONSTITUTION 110, 118 (Neal Devins & Keith Whittington eds., 2005); Aaron-Andrew P. Bruhl, *If the Judicial Confirmation Process Is Broken, Can a Statute Fix It?*, 85 NEB. L. REV. 960, 975–76 (2006). Chafetz argues that courts should not "inquir[e] into how Members of Congress conduct congressional business," CHAFETZ, *supra*,

is so ingrained that it may seem obvious to anybody who follows American politics.[12] But it is not clear why that should be so. If two individuals want to ensure that they will both act the same way when faced with the same situation, they can sign a contract. If Congress wants competing businesses to follow the same rules both today and tomorrow, it can pass a law. Yet senators apparently cannot adopt binding rules to govern their own legislative conduct. There may be a perfectly good reason for this, but it is at least worth asking what that reason might be.

This Article will argue there is no such reason. As a matter of constitutional law and constitutional principle, legislators should be able to adopt rules that bind them now and in the future. In practice, this means that when lawmakers[13] indicate they

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at 59, but in the context of discussing the punishment of lawmakers for official actions. Bruhl pokes holes in several possible arguments against judicial enforcement and provides no authority or argument pointing the other direction, Bruhl, *supra*, at 973–76. He concludes nonetheless that "[a] betting person would be well advised to put his or her money on a court avoiding ruling on the merits" of a case that turns on a Senate nominations rule. *Id.* at 975–76. Gerhardt states, without providing reasons, that "[n]o one seriously believes that a judicial challenge to the Senate's final or procedural judgments on appointments is possible." Gerhardt, *supra*, at 118. Two student notes consider the justiciability of Senate rules, generally, but neither focuses on nominations rules, which, as discussed below, are subject to a different analysis than legislative rules. *See generally* Michael B. Miller, *The Justiciability of Legislative Rules and the "Political" Political Question Doctrine*, 78 CALIF. L. REV. 1341 (1990); Gregory F. Van Tatenhove, *A Question of Power: Judicial Review of Congressional Rules of Procedure*, 76 KY. L.J. 597 (1987). Both pieces conclude that courts enforce congressional rules, though they differ as to when courts should.

[12] For example, before and after Senate Democrats used the "nuclear option" to change Senate rules in 2013, Republicans accused them of breaking the rules. Daniel Halper, *McConnell: Harry Reid Wants to Break the Rules to Change the Rules*, WKLY. STANDARD (Nov. 28, 2013, 11:18 AM), https://www.washingtonexaminer.com/weekly-standard/mcconnell-harry-reid-wants-to-break-the-rules-to-change-the-rules [https://perma.cc/KTW8-U3QV]; 158 Cong. Rec. S6987–88 (daily ed. Sept. 28, 2012) (statement of Sen. Mitch McConnell). Even advocates for the nuclear option conceded that it violated the plain text of the Standing Rules of the Senate. *See* William G. Dauster, *The Senate in Transition or How I Learned to Stop Worrying and Love the Nuclear Option*, 19 N.Y.U. J. LEGIS. & PUB. POL'Y 631, 633, 640–41 (2016). Yet nobody filed suit, and nobody appears to have seriously considered it. Democrats have also declined to initiate legal action even when they believed Republicans had violated Senate rules. *See* Brett Molina, *Judiciary Committee Democrats Walk Out of Hearing in Protest*, USA TODAY (Sept. 28, 2018), https://www.usatoday.com/story/news/politics/2018/09/28/brett-kavanaugh-judiciary-democrats-walk-out-hearing/1453945002/ [https://perma.cc/VUQ3-37Y5]; S. Comm. on the Judiciary, *Senate Judiciary Committee Executive Business Meeting*, Committee on the Judiciary (Sept. 28, 2018), https://www.judiciary.senate.gov/hearings/watch?hearingid=EE125AA9-5056-A066-60CA-8151184A6819 [https://perma.cc/SE69-C7WG], at 31:15–32:57.

[13] I do not specify how lawmakers should invite judicial action. It could be argued that only a statute can grant the courts jurisdiction to enforce congressional rules. Conversely, scholars have argued that statutes purporting to lock in Senate rules are unconstitutional. Bruhl, *supra* note 11, at 962, 964–67; Eric A. Posner & Adrian Vermeule, *Legislative*

intend particular nominations rules[14] to be judicially enforced, courts should honor Congress's judgment by deciding cases that turn on congressional rules in a manner consistent with those rules.[15]

The prospect of judicial enforcement for Senate nominations rules has received little discussion in academic literature[16] or popular press. In part, this may reflect the pervasiveness of the conventional wisdom. Moreover, a catch-22 prevents reconsideration of the question. For reasons discussed below, the Senate is unlikely to adopt a nominations rule that would rely, for its effectiveness, on judicial enforcement.[17] As a result, courts are not faced with Senate rules that purport to be judicially enforceable, and they cannot assure the Senate that such rules will be enforced. Senate inaction leads to judicial inaction, which in turn supports Senate inaction. And the conventional wisdom remains strong.

However, recent developments may make judicial rules enforcement more relevant. After the Democrats' use of the nuclear option in 2013 and the Republicans' in 2017, the minority has lost a powerful mechanism for punishing Senate rules violations by the majority: filibusters of majority party nominees.[18] The impact could be seen in the Kavanaugh nomination fight, when Democrats made public

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Entrenchment: A Reappraisal, 111 YALE L.J. 1665, 1699–1700 (2002). *But cf.* Michel v. Anderson, 14 F.3d 623, 628 (D.C. Cir. 1994) (suggesting, in dicta, that a procedural rule created by statute would "trump any authority of the House to change its rules unilaterally to grant that power"). This Article will argue only that lawmakers have *some* mechanism available to adopt rules that the courts can interpret and apply in relevant cases.

[14] This Article is limited to rules regarding nominations, not legislation. As discussed below, there are policy and legal reasons to distinguish between the two contexts. Ittai Bar-Siman-Tov has waged a one-man campaign to persuade courts to review the legislative process. *See* Ittai Bar-Siman-Tov, *The Puzzling Resistance to Judicial Review of the Legislative Process*, 91 B.U. L. REV. 1915 (2011); Ittai Bar-Siman-Tov, *Semiprocedural Judicial Review*, 6 LEGISPRUDENCE 271 (2012); Ittai Bar-Siman-Tov, *Legislative Supremacy in the United States: Rethinking the Enrolled Bill Doctrine*, 97 GEO. L.J. 323 (2009) [hereinafter Bar-Siman-Tov, *Legislative Supremacy*]; Ittai Bar-Siman-Tov, *Lawmakers as Lawbreakers*, 52 WM. & MARY L. REV. 805 (2010); Ittai Bar-Siman-Tov, Separating Law-Making from Sausage-Making: The Case for Judicial Review of the Legislative Process (2011) (S.J.D. dissertation, Columbia University) (ProQuest). While I find some of Bar-Siman-Tov's arguments compelling, I do not attempt to make the case that courts should enforce rules govern the lawmaking process, given the longevity of courts' refusal to do so.

[15] For the sake of brevity, I will refer to the judicial act of interpreting and applying congressional rules in relevant cases as judicial "enforcement" of congressional rules. This follows, for example, Bruhl, *supra* note 11, at 967.

[16] *See, e.g.*, *supra* note 11.

[17] *See infra* Section I.E.

[18] William Dauster describes several Senate norms that are currently enforced by "the implicit threat of a minority party filibuster of a President's judicial nomination" if the norms are violated. Dauster, *supra* note 12, at 670. After the invocation of the nuclear option by Leader Reid—who Dauster worked for in the Senate—these norms can be safely violated. *Id.* at 670–80. Dauster considers this a feature, not a bug.

accusations of rules violations,[19] but were unable to deter Republicans or derail the nominee.[20] This absence of tools available for intra-Senate rules enforcement makes the question addressed in this Article more urgent and important.

In Part I of the Article, I will describe a rule that the Senate might adopt to regulate the nominations process, and I make the case that even widely supported rules may not be adopted if they cannot be judicially enforced. The goal here is not to argue for any particular rule. Rather, I want to demonstrate only that there exist plausible procedural reforms that could improve the current nominations process, but are effectively unavailable in the absence of judicial enforcement.

In Part II, I review the case law governing judicial enforcement of congressional rules. Contrary to what one might expect from following Congress, those cases that have addressed the question suggest courts should apply congressional rules in appropriate cases.

In Part III, I make a case for judicial enforcement based on constitutional principle. Specifically, I argue that judicial enforcement facilitates majority rule, and the constitutional values majoritarianism is meant to serve. Since concerns about counter-majoritarianism are generally cited to justify limitations on federal court jurisdiction, a conclusion that judicial action in this case *encourages* majoritarianism counsels strongly in favor of such action. Part III also addresses several counter-arguments.

I. NOMINATIONS RULES AND THE PRISONER'S DILEMMA

The Senate Standing Rules governing nominations contain a variety of procedural requirements, ranging from the impactful and controversial (Rule XXII's supermajority cloture requirement[21]) to the mundane (requiring "the names of nominees confirmed or rejected" to be "furnish[ed] to the press"[22]). Sixteen pages of binding

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[19] The clearest rules violation came when Chairman Grassley ended Judiciary Committee debate on the nomination without the support of any Democratic senator. Senate Judiciary Committee Rule IV provides that "debate shall be terminated if the motion to bring the matter to a vote without further debate passes with twelve votes in the affirmative, one of which must be cast by the minority." S. Comm. on Judiciary, *Rules of Procedure United States Senate Committee on the Judiciary*, Comm. on the Judiciary, https://www.judiciary.senate.gov/about/rules#:~:text=IV.&text=If%20there%20is%20objection%20to,be%20cast%20by%20the%20minority [https://perma.cc/3UK7-ZXEL] (last visited Mar. 1, 2023); *see also* Molina, *supra* note 12; S. Comm. on the Judiciary, *supra* note 12, at 31:15–32:57.

[20] In theory, a Senate minority could respond to a nominations rule violation by filibustering legislation. However, even assuming the majority would not nuke the legislative filibuster in response to that kind of action, senators may feel they will pay political costs for punishing a nominations rule violation by filibustering legislation that they would otherwise support, particularly if the nominations rule fight is arcane or complicated.

[21] S. COMM. ON RULES & ADMIN., STANDING RULES OF THE SENATE, S. Doc. No. 113-18, at R. XXII, ¶ 2 (2013).

[22] *Id.* at R. XXXI, ¶ 7(c) (2013).

precedents provide additional guidance.[23] Yet these rules provide little in the way of limitations on those practices that have led to rancorous fights between the parties, and outcomes that both sides, as well as outside observers, generally consider suboptimal.[24]

Granted, some questions do not lend themselves to clear answers of the type that could be codified in a rule book or precedent. However, in this Part I will suggest a rule that would at least plausibly constitute an improvement over the status quo. With this proposed rule in mind, this Part will then argue that so long as it is assumed such rules cannot be enforced by the courts, they are unlikely to be adopted, even if they are widely popular.

A. An Action-Forcing Nominations Rule

Consider the following rule:

> All judicial nominees submitted to the Senate by the president before August of the fourth year of the president's term shall receive a vote by the Senate within 120 days. No nominee submitted after August of the fourth year of the president's term shall receive a vote during that Congress. Cloture on any motion to waive, amend, or repeal this rule can be invoked only by a vote of three-fifths of the Senate.

This rule is borrowed, with some modifications, from work by Professor Aaron-Andrew Bruhl[25] and I will not rehash all of Bruhl's arguments for it. Chiefly, the

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[23] *See generally* Floyd M. Riddick & Allan Frumin, RIDDICK'S SENATE PROCEDURE: PRECEDENTS & PRACTICES, S. DOC. NO. 101-28, at 938–53 (1992). Senate precedents are a source of binding rules, much like judicial precedent in a common law system. MARTIN GOLD, SENATE PROCEDURE & PRACTICE 2, 7–8 (3d ed. 2013).

[24] *See* Gerhardt & Painter, *supra* note 6, at 275–80; John Cornyn, *Our Broken Judicial Confirmation Process and the Need for Filibuster Reform*, 27 HARV. J.L. & PUB. POL'Y 181, 190–94 (2003); *see also* Stephanie K. Seymour, *The Judicial Appointment Process: How Broken Is It?*, 39 INT'L SOC'Y BARRISTERS Q. 467 (2004) (addressing the slowdown on judicial nominations and its impact on the public).

[25] Bruhl, *supra* note 11, at 971–73. A rule along these lines has been proposed by Senate experts on both sides of the partisan divide. Michael Gerhardt, an advisor to Senate Democrats, and Richard Painter, an official in the George W. Bush Administration, have proposed a requirement for full consideration of all judicial nominees as part of a broader agreement between the Senate majority and minority leaders. *See* Gerhardt & Painter, *supra* note 6, at 275–80. The Bush Administration similarly called for a commitment to schedule a vote on judicial nominees within 180 days of nomination. Press Release, Pres. George W. Bush, President Calls for Judicial Reform, Remarks by the President on Judicial Independence and the Judicial Confirmation Process (May 9, 2003), https://georgewbush-whitehouse.archives.gov/news/releases/2003/05/text/20030509-4.html [https://perma.cc/AS7W-UFWQ].

rule would help to ensure the efficient functioning of the nominations process, and a reasonably well-staffed federal bench.[26]

For present purposes, two potential benefits of a rule like this one bear special emphasis. First, the rule contributes to majoritarianism.[27] Under current rules, even if the President and the Senate agree that a nomination should proceed, the nominee can still be vetoed by the majority leader. Assuming the majority leader reflects the median of his caucus,[28] senators representing slightly over a quarter of the Senate and four percent of the American population could reject a nominee broadly supported in the rest of the country.[29] Worse, the majority leader may be more likely to take a hard stand than the median member of his caucus. Party legislative leaders have special responsibilities for raising funds from donors,[30] who tend to have extreme views.[31] He is, therefore, likely to spend more time than other members of his caucus trying to appeal to people who will chastise him for failing to obstruct the nominees of an opposing party president. More generally, the majority leader may feel he has a special responsibility to lead the opposition to a president not of his

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[26] Bruhl, *supra* note 11, at 971–73. *Cf.* Lee Renzin, *Advice, Consent, and Inaction: How the Courts Can Require the Senate to Vote on Judicial Nominations*, 82 JUDICATURE 166 (1999) (arguing the Constitution guarantees a timely vote for judicial nominees).

[27] I rely here on the basic framework articulated in KEITH KREHBIEL, PIVOTAL POLITICS 22–24 (1998). Under this framework, lawmakers are ranked according to their likelihood of voting a particular way, for example, in favor of final passage, in favor of cloture, or to override a veto. The pivotal senator is the final senator whose vote is needed for a motion to carry. For example, the filibuster pivot is the senator who is ranked number 60 in terms of her likelihood of voting to invoke cloture. By assumption, if the pivotal senator supports a motion, it passes. If she opposes the motion, it fails.

[28] Given that the leader keeps his position by winning and retaining the support of more than half of his caucus, this assumption is unexceptional. *See* BARBARA SINCLAIR, LEGISLATORS, LEADERS AND LAWMAKING: THE U.S. HOUSE OF REPRESENTATIVES IN THE POSTREFORM ERA 18 (1995).

[29] In 2019, the thirteen smallest states—sufficient to command a majority of the majority party—had, collectively, fewer than 14.4 million residents, or just 4.4% of the U.S. population. Calculations by author, based on data from U.S. Census Bureau, Annual Estimates of the Resident Population for the United States, Regions, States, and Puerto Rico: April 1, 2010 to July 1, 2019 (2020).

[30] *See* STEVEN S. SMITH ET AL., THE AMERICAN CONGRESS 135 (4th ed. 2006); Eric S. Heberlig & Bruce A. Larson, *Redistributing Campaign Funds by U.S. House Members: The Spiraling Costs of the Permanent Campaign*, 30 LEGIS. STUD. Q. 597, 615–21 (2005). The importance of money also allows extreme lawmakers with privileged access to extreme donors to win party leadership elections against more representative candidates, producing party leaders more extreme than the median lawmaker in their caucus. *See* Eric Heberlig, Marc Hetherington & Bruce Larson, *The Price of Leadership: Campaign Money and the Polarization of Congressional Parties*, 68 J. POL. 992, 996–98 (2006).

[31] Michael J. Barber, *Representing the Preferences of Donors, Partisans, and Voters in the U.S. Senate*, 80 PUB. OP. Q. 225, 227–28, 239–40 (2016); Jordan Kujala, *Donors, Primary Elections, and Polarization in the United States*, 64 AM. J. POL. SCI. 587, 588 (2020).

party.[32] The proposed nominations rule would take away the majority leader's veto, and allow the median senator, who is more likely to represent the views of most Americans, to determine nominees' fate.

The proposed rule also contributes to accountability for rank-and-file senators.[33] When Senate leaders refuse to hold a vote on a nominee—and particularly when they refuse to even begin the confirmation process—most senators never have to take a position on the nomination.[34] For the highest profile nominees, each senator may be asked for their views by the press, but that request can be ignored. In most cases, a nominee can be vetoed while most senators take no public position whatsoever, and pay no cost for failing to do so. While high profile nominees, such as Merrick Garland, receive press attention when their nominations languish, these nominations are only the tip of the iceberg. Fifty judicial nominations failed in 2016 after the Senate declined to act on them, more than seventy percent of the president's selections.[35]

B. An Enforceable Action-Forcing Rule Is Politically Feasible

Even if a reader is persuaded of the wisdom of this nominations rule, they might question whether such a rule could be adopted. Generally, the argument runs, if sixty or even sixty-seven votes are needed to adopt such a rule,[36] that requires an

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[32] Political scientists—who tend to focus on the House over the Senate—have made this case with respect to the House Speaker. *See* MATTHEW N. GREEN, THE SPEAKER OF THE HOUSE: A STUDY OF LEADERSHIP 12 (2010); RANDALL STRAHAN, LEADING REPRESENTATIVES: THE AGENCY OF LEADERS IN THE POLITICS OF THE U.S. HOUSE 17–18 (2007). While the Speaker may have a higher profile than the Senate majority leader, the majority leader faces similar incentives, relative to rank-and-file senators, to emphasize his opposition to an opposing party president.

[33] *See* Renzin, *supra* note 26, at 168.

[34] *Id.*

[35] CONG. RSCH. SERV., R45622 JUDICIAL NOMINATION STATISTICS AND ANALYSIS: U.S. CIRCUIT AND DISTRICT COURTS, 1977–2020, at 13 (2021). The number of returned nominees was high but not unprecedented. *See id.*

[36] It is not clear what would be required. I am skeptical that an "asymmetrically entrenched" Senate rule—a rule that requires more votes to repeal than it garnered when it was adopted—would or should be upheld by the courts. *See generally* John O. McGinnis & Michael B. Rappaport, *Symmetric Entrenchment: A Constitutional and Normative Theory*, 89 VA. L. REV. 385 (2003). Therefore, if the Senate wants to make it difficult for future majorities to jettison the rule, it will need to secure more than fifty-one votes to adopt it. Separately, Senate standing rules purport to require that senators get sixty-seven votes to invoke cloture on any amendments to those rules, S. COMM. ON RULES & ADMIN., *supra* note 21, at XXII ¶ 2, though nothing appears to stop the Senate from adding additional rules, separate from the standing rules, without securing sixty-seven votes. *See, e.g.*, the Congressional Budget and Impoundment Control Act, Pub. L. No. 93-344, §§ 901, 902, 904, 88 Stat. 297, 390–91 (1974); Bipartisan Trade Promotion Authority Act (BTPA) of 2002, which was enacted as

improbable level of bipartisanship. More specifically, a rule that takes power away from the Senate majority leader is particularly difficult to adopt, given the majority leader's sway with his caucus and formal power within the Senate.

Certainly, getting anything done in the Senate is difficult. But it is possible to articulate at least one set of conditions under which a rule like the one presented here would be adopted.[37] It bears repeating that the rule would empower the Senate median, since it prevents the majority leader from vetoing a nominee the median senator would accept.[38] Of course, the median might prefer not to have that power and, with it, the responsibility for a potentially fraught decision. However, the benefits of being the pivotal senator can be substantial. If a senator finds herself in this position consistently, she can play a significant role in shaping the federal bench at the margins. If she is pivotal for a nominee important to the president, she can leverage her position to secure benefits for her state and the causes she believes in. And if she values press coverage, she is likely to receive it.[39]

Title XXI of the Trade Act of 2002, P.L. 107-210. The Trade Act example is particularly instructive. That legislation never received the two-thirds vote required by the Senate standing rules for an amendment to those rules. CONG. RSCH. SERV., RL33743, TRADE PROMOTION AUTHORITY (TPA) AND THE ROLE OF CONGRESS IN TRADE POLICY 7 (2015). Yet the legislation purports to amend Senate procedures, see Bipartisan Trade Promotion Authority Act (BTPA) of 2002, 19 U.S.C. §§ 2104(d)(3), 2105(c), and the Senate has relied on trade promotion authority rules when approving trade agreements. *See* CONG. RSCH. SERV., RL33743, *supra* note 36, at 7. For a general discussion of statutized rules, see generally Charles Tiefer, *How to Steal a Trillion: The Uses of Laws About Lawmaking in 2001*, 17 J.L. & POL. 409 (2001).

[37] For a discussion of why legislative majorities adopt and retain rules that do not always serve the interests of the majority, see Christian Fong, *Rules and the Containment of Interpersonal Conflict in Congress* (unpublished manuscript) (2019).

[38] Technically, the rule would empower a group of senators who might be called "near median." This group includes every senator who sits, ideologically, between the median senator and the most moderate senator to support an approved nominee or oppose a rejected nominee. This is the set of senators who are likely to be courted in any situation in which a vote is close enough for relevant interests, including the president and party leaders, to engage in active lobbying. This group of "near median" lawmakers are likely to be offered side payments for their votes in a world where the relevant interests have constrained budgets. *See* Eddie Dekel et al., *Vote Buying: Legislatures and Lobbying*, 4 Q.J. POL. SCI. 103 (2009). If we recognize that "near median" senators, and not merely the single median senator, are likely to receive side payments in close votes, it is easier to see why a significant group of moderate senators—sufficient to pass a rule under supermajority procedures—would be likely to support the proposed nominations rule.

[39] Of course, party leaders have tools at their disposal to punish moderates who vote to transfer power from leaders to the median senator. However, party discipline is famously weaker in the Senate than in the House, Kathryn Pearson, *Party Loyalty and Discipline in the Individualistic Senate*, *in* WHY NOT PARTIES? PARTY EFFECTS IN THE U.S. SENATE 100–01 (Nathan W. Monroe, Jason M. Roberts & David Rohde eds., 2008), and it may not be all it's cracked up to be even in the House, Keith Krehbiel, *Where's the Party?*, 23 B.J. POL. SCI. 235, 261–62 (1993). Notably, since the proposed rule serves the interests of median senators at the expense of the Senate majority leader—as opposed to one party at the expense

Nor would the majority leader necessarily block the rule from getting a vote. First, moderate senators might use their ability to offer non-germane amendments on the Senate floor to attach this nominations rule to an unrelated bill or resolution. While party leaders have tools at their disposal for blocking amendments they dislike, these mechanisms require them to either kill the underlying bill, or to secure sixty votes for cloture on the underlying bill even as they deny moderates a chance to vote on their amendments.[40] Scholars disagree as to the extent of party leaders' ability to head off amendments with which they disagree.[41] However, even those who argue that Senate leadership *generally* controls the floor agenda recognize that there are numerous exceptions to the rule.[42]

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of the other—leaders' ability to punish dissident senators by appealing to the party base may be limited. Party leaders are not always popular even among their party's primary electorate. *See, e.g.*, Jonathan Easley, *Poll: McConnell the Country's Least Popular Politician*, THE HILL (Aug. 24, 2017, 12:41 PM), https://thehill.com/homenews/senate/347811-poll-mcconnell-the-countrys-least-popular-politician/ [https://perma.cc/4QMF-WPHZ]. Further, for the reasons discussed below, Senate leaders may not object to my nominations rule strongly, or at all, and may be reluctant to spend their limited political capital coercing moderates into opposing the rule.

[40] Andrea Campbell et al., *Agenda Power in the U.S. Senate, 1877 to 1986*, *in* PARTY PROCESS AND POLITICAL CHANGE IN CONGRESS: NEW PERSPECTIVES ON THE HISTORY OF CONGRESS 148 (David W. Brady & Mathew D. McCubbins eds., 2002) discuss three mechanisms party leaders can use to block a non-germane amendment: the motion to table, the motion to recommit, and filling the amendment tree. The first option works only if leadership can win over 51 senators to kill the amendment. *See* CHRISTOPHER M. DAVIS, CONG. RSCH. SERV., RS98853, THE AMENDING PROCESS IN THE SENATE 30 (2013). This is unlikely if near-median senators support the amendment. The motion to recommit is helpful only if leadership so strongly opposes an amendment that it is willing to kill the underlying bill. *Id.* at 22. Since senators can offer their amendments to any piece of legislation, the only way to stop a determined senator from getting a vote on her amendment is to stop legislating almost entirely. Finally, filling the amendment tree theoretically allows the majority leader to block amendments without killing underlying legislation, but only if he has sixty votes to invoke cloture while denying moderate senators a vote on their amendments. CHRISTOPHER M. DAVIS, CONG. RSCH. SERV., RS22854, FILLING THE AMENDMENT TREE IN THE SENATE 2–3 (2008). Even then, he can avoid further amendments only if they are not germane. *See* DAVIS, RS98853, *supra* note 40, at 29–30.

[41] The "canonical view" is that Senate leaders' ability to control the body's agenda is relatively weak. Sean Gailmard & Jeffery A. Jenkins, *Negative Agenda Control in the Senate and House: Fingerprints of Majority Party Power*, 69 J. POL. 689, 690 (2007); *see also* SMITH ET AL., *supra* note 30, at 140. However, some recent scholarship suggests a stronger role for Senate leaders. *See id.*; Campbell et al., *supra* note 40, at 146.

[42] Campbell et al., *supra* note 40, at 154–57, measure majority party agenda control by looking at the rarity of votes in which most majority party senators vote against a proposal that passes anyway (the majority gets "rolled"). They find that in five congresses during the twentieth century the majority got rolled on more than 10 percent of votes, a figure they argue is extremely low. But Campbell, Cox, and McCubbins lack a clear estimate of the number of times senators *try* to roll their party. If senators generally agree with their party leaders—who they elected, after all—they will rarely try to roll them. *Cf.* Krehbiel, *supra*

Second, a majority leader who believes that his party is less likely than the opposition to control the Senate during a period of divided government may well support a rule like the one I have proposed. Imagine (for example) a Democratic majority leader is better off by some amount—I'll call it *b*—every time he uses the current system to veto the nominee of a Republican president. *b* includes the utility the majority leader gains because his party gets one more judgeship to fill (b_j), and the satisfaction he gets from exercising the power of his office (b_p). Imagine further that whenever Republicans are in power, the Democratic leader is worse off by some amount (*c*) every time the Republican leader vetoes a Democratic nominee. *c* is simply the disutility that a Democratic majority leader experiences from having a judgeship filled by the Republicans instead of the Democrats, so assume $b_j = c$.[43] Some straightforward arithmetic shows that the Democratic leader should support the rule if he believes that Republicans are likely to control the Senate for more than 100b/(b+c) percent of divided government nominations. Even if the Democratic leader is reluctant to give up his own power, it is not difficult to imagine him supporting the rule. For example, if the Democratic leader gets fifty percent more satisfaction from using his veto than he loses from watching the Republican leader use *his* veto, then the Democratic leader should support our rule if he believes Republicans are likely to control the Senate during more than sixty percent of divided government nominations.[44] If the leaders are risk averse and neither party is sure who will control the Senate going forward, it is possible that both party leaders would support this rule.

C. A Note on Remedies

Perhaps the most controversial aspect of this action-forcing rule is that it opens the possibility of courts ordering the Senate to take a vote, a judicial action that

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note 39, at 262 (finding that apparently partisan behavior by House members can be explained by members' preferences). In that case, the numbers cited by Campbell, Cox and McCubbins suggest that on those rare occasions when senators propose an amendment their party leadership opposes, the proposers have a decent chance of success. Campbell, Cox and McCubbins also ignore the possibility that their statistics leave out a substantial number of rolls in which majority party leaders accepted a hostile amendment they did not have the votes to defeat, rather than allowing for a vote that divided their caucus and exposed their impotence.

[43] If majority leaders feel the loss of something they believe they deserve more acutely than the gain of something of equal value, Daniel Kahneman & Amos Tversky, *Prospect Theory: An Analysis of Decision Under Risk*, 47 ECONOMETRICA 263 (1979), then $b_j < c$, and a majority leader is even more likely to support the rule.

[44] Since a long period of Democratic Party dominance ended in 1980, Democrats have controlled the Senate in all or most of six out of the ten Congresses (60 percent) in which the Senate and the presidency were controlled by different parties. Calculations by author based on data from *Party Divisions*, U.S. SENATE, https://www.senate.gov/history/partydiv.htm [https://perma.cc/98R8-7869] (last visited Mar. 1, 2023). However, given Republican advantages in small states that enjoy disproportionate power in the Senate, this trend seems unlikely to continue.

might make some judges uncomfortable.[45] Of course, courts frequently order the political branches to act.[46] In this case, the action being ordered is not even substantive. Under our proposed rule, the Senate can reject any nominee it does not like. It simply cannot decline to vote.[47] If courts are comfortable ordering the executive branch to act in favor of particular interests, one could argue, they ought to be comfortable ordering the Senate to make a decision, without telling the Senate what that decision should be.

If the courts do not feel comfortable taking that step, they have another option. Under settled precedent, if a court does not believe it can provide equitable relief, it must nonetheless provide any remedy available at law.[48] That means courts should issue a declaratory judgments that the Senate must vote on a nominee, even if they are unwilling to issue an injunction ordering the Senate to vote.[49] Of course, this raises the possibility that a judicial order will be ignored and a court will be forced to either follow up with an injunction or lose stature by acquiescing. This is a valid concern, but it is not dispositive. Courts occasionally have their orders ignored and must decide how to respond.[50] While this may diminish judicial power and prestige

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[45] *See* Bruhl, *supra* note 11, at 975.

[46] *See generally* James E. Pfander & Jacob P. Wentzel, *The Common Law Origins of* Ex Parte Young, 72 STAN. L. REV. 1269 (2020). Perhaps the most famous case in which a litigant requested a judicial order compelling action by the political branches involved the nominations process. *See* Marbury v. Madison, 5 U.S. 137, 173 (1803).

[47] A comparable situation arises when the president refuses to nominate anybody to serve in a particular role. At least one district court has held that it had jurisdiction in a suit demanding the president make a nomination while leaving him free to decide who to nominate. Minn. Chippewa Tribe v. Carlucci, 358 F. Supp. 973, 975–76 (D.D.C. 1973). The president subsequently made the requested appointments, rendering the case moot before a decision on the merits. *See* Anne Joseph O'Connell, *Vacant Offices: Delays in Staffing Top Agency Positions*, 82 S. CALIF. L. REV. 913, 984–85 (2009). While courts rarely order the president to fill a vacancy, this does not suggest they have no power to issue affirmative orders in cases involving nominations. Rather, few litigants have standing to compel a presidential appointment, since before the president has settled on a nominee the impact of a nomination will be too uncertain. *Id.* at 985. When the Senate declines to vote on a nominee, by contrast, the nominee should have standing to sue. *Cf.* Renzin, *supra* note 26, at 172 (nominees have "perhaps [the] most powerful" case for standing to challenge Senate's failure to act).

[48] *See* Powell v. McCormack, 395 U.S. 486, 499 (1969); United Public Workers of Am. v. Mitchell, 330 U.S. 75, 93 (1947).

[49] *See Powell*, 395 U.S. at 499 (1969).

[50] *See* Nicholas R. Parrillo, *The Endgame of Administrative Law: Governmental Disobedience and the Judicial Contempt Power*, 131 HARV. L. REV. 685, 686 (2018); Larry D. Kramer, *The Supreme Court 2000 Term—Foreword: We the Court*, 115 HARV. L. REV. 5, 6 n.4 (2001) (first citing ROBERT S. ALLEY, WITHOUT A PRAYER: RELIGIOUS EXPRESSION IN PUBLIC SCHOOLS 21–24 (1996); then citing FRANK S. RAVITCH, SCHOOL PRAYER AND DISCRIMINATION: THE CIVIL RIGHTS OF RELIGIOUS MINORITIES AND DISSENTERS 3, 73 (1999); then citing JANET HADLEY, ABORTION: BETWEEN FREEDOM AND NECESSITY 1–17 (1996); and then citing Mira Weinstein, *On 25th Anniversary of Roe v. Wade, NOW Asks "Who Still Has a Choice?"*, NAT'L NOW TIMES (Jan. 1998)).

to some degree, it is generally not considered a reason for the courts to reject a task assigned to them by the legislature.[51]

Even if courts should not be in the business of demanding Senate action, they may still have a role to play in enforcing Senate rules. If Senate rules prohibit the body from approving a nomination under specified circumstances—for example, if the nomination is submitted late in an election year—courts could enforce those rules simply by holding, when considering an appeal from an order issued by an unlawfully confirmed judge, that the judge is not legally in office.[52] Alternatively, the Senate, or an individual litigating before an unlawfully appointed judge, could file a writ *quo warranto* where authorized under state law, or otherwise seek an order declaring the judge's confirmation invalid.[53] Either way, judges need only decide which judicial actions are valid, a task they perform every day.

D. Distinguishing Enforcement from Entrenchment

It is important to distinguish my argument from the claim that legislators can entrench rules against change by future lawmakers. My proposal would prevent only a particular kind of legislative change, what might be called "amendment by violation." Without judicial enforcement of Senate rules, any Senate action contrary to the rules as written can be plausibly described in two different ways. A formalist might say that the Senate has violated its own rules; the fact that no consequences follow from the violation is beside the point. A certain type of realist, on the other hand, could just as easily argue that no violation has taken place. If the law is simply a set of demands issued by an entity with the power to punish violations,[54] then the fact that the Senate cannot be punished for violating its rules means that those rules never really existed in the first place. By choosing to act contrary to the written rule, the Senate effectively changed the rule.[55]

Judicial enforcement would eliminate this mechanism for amending Senate rules. Since violations of Senate rules would trigger legal consequences, both the

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[51] *See* Martin H. Redish, *Judicial Review and the Political Question*, 79 NW. U. L. REV. 1031, 1043–44, 1053–54 (1984–1985).

[52] The Supreme Court has done just that when reviewing the adjudicative actions of an administrative agency. *See* NLRB v. Noel Canning, 134 S. Ct. 2550, 2574–75, 2578 (2014).

[53] *See* United States v. Smith, 286 U.S. 6 (1932); *In re* Sawyer, 124 U.S. 200, 212 (1888).

[54] *See generally* JOHN AUSTIN, THE PROVINCE OF JURISPRUDENCE DETERMINED (New York, Burt Franklin 1832).

[55] Supporters of the "constitutional option" make an analogous argument. Noting that the Senate frequently interprets rules in a manner obviously inconsistent with their text, they claim that Senate rules are amendable by interpretation, since the interpretation and not the written rule governs. *See* Dauster, *supra* note 12, at 649–56. One of the benefits of allowing judicial enforcement of Senate rules is that it allows the Senate to say "we mean it" when it adopts a rule, an option it does not currently have.

formalist and the realist would have to agree that the rules are real, and that they continue to be rules even when they are violated. However, this would not entrench the rules against future change. The Senate would make a separate decision—distinct from its decision about judicial enforcement—as to what procedures must be used to change Senate rules.

Even an aggressively anti-entrenchment position is consistent with the claim in this Article. Scholars who argue that legislative entrenchment is impermissible tend to accept the Senate's supermajority cloture rule,[56] at least provided the rule can be repealed by majority vote.[57] This position makes good sense. As Josh Chafetz, a critic of the filibuster, points out, the brand of majoritarianism suggested by the U.S. Constitution cannot be interpreted as requiring "the immediate fulfillment of every wish of the legislative majority. After all, all procedural rules delay the implementation of majority will to some extent, and all rulemaking has at least something of an entrenching effect."[58] Forcing lawmakers to vote on repealing a rule, rather than simply ignoring it, allows the majority to work its will, while encouraging it to carefully consider whether "the underlying issue was important enough to justify changing the rules of the game."[59] By implication, there is nothing impermissible—even under strong anti-entrenchment principles—about adopting a rule that binds the Senate unless and until it is repealed by majority vote.[60] Indeed, any statute without a sunset provision is entrenched until Congress changes it using a process that is quite a bit more cumbersome than a simple majority vote in the Senate. Yet nobody claims that this raises an entrenchment problem,[61] and if it did, legislation itself would be impossible.

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[56] Jed Rubenfeld, *Rights of Passage: Majority Rule in Congress*, 46 DUKE L.J. 73, 88 (1996). Rubenfeld does not argue that entrenchment is never permissible on principle. Rather, he argues that majority rule at final passage is required by the U.S. Constitution specifically. *Id.* at 75–76.

[57] Catherine Fisk & Erwin Chemerinsky, *The Filibuster*, 49 STAN. L. REV. 181, 248–49, 252 (1997); John C. Roberts & Erwin Chemerinsky, *Entrenchment of Ordinary Legislation: A Response to Professors Posner and Vermeule*, 91 CALIF. L. REV. 1780, 1780–81 (2003); Josh Chafetz, *The Unconstitutionality of the Filibuster*, 43 CONN. L. REV. 1003, 1015 (2011); McGinnis & Rappaport, *supra* note 36, at 407–08. *But cf.* Benjamin Lieber & Patrick Brown, Note, *On Supermajorities and the Constitution*, 83 GEO. L.J. 2347, 2348, 2381–84 (1995) (arguing Senate cloture rule is on "shaky constitutional grounds"); Symposium, *The Constitutional Structure of National Government in the United States: Is It in a State of Crisis?*, 9 ADMIN. L.J. AM. U. 1, 38–39 (1995) (Professor James Thurber criticizes filibuster at conference, though not clearly on constitutional grounds).

[58] CHAFETZ, *supra* note 11, at 1015.

[59] *See id.* at 1015–16.

[60] *Cf.* Bruhl, *supra* note 11, at 985–90 (rejecting entrenchment-based argument against statutized rules).

[61] Michael J. Gerhardt, *The Constitutionality of the Filibuster*, 21 CONST. COMMENT 445, 468 (2004); Posner & Vermeule, *supra* note 13, at 1686–87.

A skeptic could counter that even if judicial enforcement is theoretically possible without entrenchment, it is meaningless.[62] If the Senate majority wants to take some action that violates a rule, it will simply vote to waive the rule and then take whatever action it had in mind.

It is true that a non-entrenched rule will be less effective at constraining future majorities, but judicial enforcement may nonetheless render such a rule more effective.[63] To see why, compare two situations. In the first, the rule is not judicially enforceable. If the Senate majority leader would prefer not to move a nominee, he simply does not move the nominee; nobody but the majority leader needs to make any decision. The majority leader has an incentive to block the nominee if half his caucus opposes the nominee, particularly if a significant number of them feel strongly about it.

In the second situation, if the majority leader wants to block a nominee, he must get the support of most of the Senate to change or waive the rule. This means that a majority must oppose the nominee, but also be unwilling to simply give the nominee a vote and defeat her nomination. Further, a majority of the Senate must be willing to go on record not just opposing a particular nominee but rejecting the principle codified in the Senate rule, and they must be willing to set the precedent that rules will be changed when they become inconvenient.[64] All this suggests that even minimally entrenched rules will be far more difficult to change if they can be judicially enforced.

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[62] Jon Elster makes a similar claim in a different but analogous context. *See* JON ELSTER, ULYSSES UNBOUND: STUDIES IN RATIONALITY, PRECOMMITMENT AND CONSTRAINTS 116 (2000).

[63] A non-entrenched rule may be valuable even if it does not change the majority's behavior. Political scientist Christian Fong has argued persuasively that, under plausible assumptions, a rule that merely codifies what a legislative majority would do anyway may reduce conflict, as lawmakers disappointed in the majority's actions are less likely to engage in costly retaliation if those actions were dictated by neutral rules established in advance. Fong, *supra* note 37, at 11–12. Since third party enforcement makes the Senate majority less free to act contrary to the rules that nominally govern a given situation, it should leave those subject to the majority's decisions less angry when those decisions go against them. If so, judicially enforceable rules may reduce hard feelings (which can themselves reduce collegiality and cooperation) and costly intra-cameral conflict.

[64] The history of the nuclear option suggests that it is difficult to get a majority of senators to support a rules change, even when the rule in question hurts their short-term interests. *See* GREG WAWRO & ERIC SCHICKLER, FILIBUSTER: OBSTRUCTION AND LAWMAKING IN THE U.S. SENATE 3–5 (2006); Martin B. Gold & Dimple Gupta, *The Constitutional Option to Change Senate Rules and Procedures: A Majoritarian Means to Overcome the Filibuster*, 28 HARV. J.L. PUB. POL'Y 205, 219–60 (2004). Senators have always chosen to compromise rather than jettison the legislative filibuster, and they went nuclear on the nominations filibuster only after both parties became convinced it was being abused. *See* Dauster, *supra* note 12, at 641–45; Cornyn, *supra* note 24, at 190–94.

E. Why This Rule (and Others Like It) Is Unlikely to Be Adopted in the Absence of Judicial Enforcement

A rule similar to the one discussed here has been proposed by a bipartisan duo, including a prominent advisor to Democratic lawmakers and an official in the George W. Bush Administration,[65] as well as by the Bush Administration itself,[66] but to my knowledge it has not been seriously considered by Senate leadership. A closer look at the structure of the Senate makes this result unsurprising.

Imagine that senators in both parties agree that the rule would be good for the country and their party. However, senators also recognize that if their party follows the rule and the other does not, they will have ceded the judiciary to the other party. Senators face a collective action problem analogous to the classic prisoner's dilemma.[67] Both parties would be better off if they could both follow the proposed rule, but each party's incentives push it to violate the rule. Given this, the rule is never adopted,[68] and the outcome is suboptimal for all involved.

Professors David Law and Sanford Levinson capture this logic particularly evocatively when they argue that regulating the judicial nominations process may be more difficult than achieving nuclear disarmament.[69] Unfortunately, if anything,

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[65] *See generally* Michael Gerhardt & Richard Painter, *"Extraordinary Circumstances": The Legacy of the Gang of 14 and a Proposal for Judicial Nominations Reform*, 46 U. RIC. L. REV. 969 (2012); Gerhardt & Painter, *supra* note 6, at 279. Gerhardt and Painter would include their rule in an agreement between the majority and minority leaders. *Id.* at 279–80.

[66] Press Release, President Calls for Judicial Reform, Remarks by the President on Judicial Independence and the Judicial Confirmation Process, May 9, 2003, at https://georgewbush-whitehouse.archives.gov/news/releases/2003/05/text/20030509-4.html [https://perma.cc/V4X2-29GK].

[67] *See* David S. Law, *Appointing Federal Judges: The President, the Senate, and the Prisoner's Dilemma*, 26 CARDOZO L. REV. 479, 479 (2012). Law's characterization of the nominations game as a prisoner's dilemma is best read as a helpful oversimplification. The situation described here differs from the classic dilemma in that the players move sequentially and not simultaneously. However, the crucial factor in a prisoner's dilemma is not that the players move simultaneously but that one player's actions do not depend on the other's.

[68] One could argue that reputational or relational concerns will lead parties to play by the rules provided the benefits of rule breaking are low. *See* David S. Law & Sanford Levinson, *Why Nuclear Disarmament May Be Easier to Achieve Than an End to Partisan Conflict over Judicial Appointments*, 39 U. RICH. L. REV. 923, 931 n.28 (2004). However, rule breaking should still be expected for important nominees. Further, if voters or activists come to focus on nominees who would previously have been noncontroversial, a growing share of nominations may come to be seen as politically important. *See generally* NANCY SCHERER, SCORING POINTS: POLITICIANS, ACTIVISTS, AND THE LOWER FEDERAL COURT APPOINTMENT PROCESS (2005); Charles M. Cameron et al., *From Textbook Pluralism to Modern Hyperpluralism*, 8 J. L. & CTS. 301 (2020). Even if senators would follow the rules for some nominations, rules governing the nominations process will matter least in those highly politicized situations where they are needed most.

[69] Law & Levinson, *supra* note 68, at 923.

Law and Levinson understate the case.[70] When a majority leader refuses to fill a judicial vacancy with a nominee from the opposing party, he does more than just deny his political opponents a judgeship. He also preserves a vacancy for his own party to fill. The Garland nomination provides a particularly clear example. Not only did Majority Leader McConnell prevent the Supreme Court from having a Democrat-appointed majority, he provided Donald Trump with the opportunity to move the Court even further to the right and to cement that orientation for decades.[71] To use Law and Levinson's metaphor, regulating the nominations process is like attempting to secure nuclear disarmament in a world where every time a nation refuses to destroy one of its own weapons, it automatically subtracts one weapon from the arsenal of its only adversary. In short, it is very difficult.

A famous game theoretic result known as the Folk Theorem says that the prisoner's dilemma logic may be overcome if players expect to continue playing indefinitely and a set of other conditions hold.[72] However, the Folk Theorem may be of limited relevance in this context. It requires players to (1) put sufficient value on gains made in the future relative to gains made today and (2) be able to create complicated mechanisms for punishing "defections" (violations of whatever rules the players create for themselves).[73] Both prerequisites are likely to be absent in the Senate. Senators at the end of their careers, who enjoy disproportionate power in the Senate, are unlikely to place sufficient value on gains they can make in the future, given the probability they will not be playing the Senate game much longer.[74] And the complicated punishment strategies needed to make a Folk Theorem equilibrium possible require senators to do strange things, like punishing colleagues for actions taken before the punishers became senators, and to achieve broad agreement on what conduct should be punished and how.[75]

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[70] *Id.*

[71] Oriana Gonzales, *McConnell: Blocking Obama's SCOTUS pick led to overturning* Roe v. Wade, AXIOS (June 29, 2022), https://www.axios.com/2022/06/29/mcconnell-obama-supreme-court-roe [https://perma.cc/6YC4-7WKY].

[72] *See* DREW FUDENBERG & JEAN TIROLE, GAME THEORY 150 (1991). The Folk Theorem, so named because it was widely known to game theorists before it was published, is really a set of game theoretic results indicating situations under which players may find equilibria in infinitely repeated games that would be unavailable when games are played only a finite number of times. *Id.*

[73] *Id.* at 150–65.

[74] *See* Law, *supra* note 67, at 504. Law also argues that the involvement in nominations of a president with a fixed end to his time in office undermines the potential for a cooperative equilibrium, *id.*, though that concern is less relevant to the argument advanced here.

[75] In contexts other than nominations, scholars have noted that equilibria that "are supported by complex punishment strategies [] are unlikely to be self-enforcing in a large legislature with turnover." David Baron & John Ferejohn, *Bargaining in Legislatures*, 83 AM. POL. SCI. REV. 1181, 1181 (1989); *see also* Kenneth A. Shepsle, Eric S. Dickson & Robert P. Van Houweling, *Bargaining in Legislatures with Overlapping Generations of Politicians*

Players may also overcome prisoner's dilemma logic even if they expect to continue playing the game only for a finite number of rounds, provided other players might rationally punish them in later iterations of the game for poor behavior in earlier iterations. But to compel compliance with the rules of the game a threat of punishment must be both frightening and credible.[76] A threat is credible only if the punisher will rationally carry it out, should punishment be necessary.[77] A spouse who threatens to burn down the family home if their partner chews with their mouth open one more time has not really changed the chewer's incentives. Burning down the house would be irrational, and the chewer does not actually think their spouse will do it.

Many of the tools that could theoretically be used to punish overreaching by the Senate majority suffer from a credibility gap. Take a threat by the minority to "shut the Senate down" by objecting to all unanimous consent requests if the majority party violates a particular norm.[78] Senators acting strictly rationally will only agree to unanimous consent requests if doing so is in their interest; for example because some of the business of the Senate benefits the consenting senator or her constituents, or because Senator A's consent in an area important to Senator B is repaid by Senator B's consent in an area important to Senator A. Therefore, any threat by the minority to object to all consent requests is a promise by the minority to do something harmful to the minority. In a perfectly rational world, this kind of threat is not credible.

In the real world, senators frequently do things that are not in their short-term interest, in service of cameral comity.[79] Among other things, this allows them to punish their colleagues by denying these favors when things go south. However, as comity declines, senators will do fewer and fewer of these favors, leaving them with fewer options when they want to punish a serious breach. When no Democrat (Republican) even considers voting for a remotely controversial Republican (Democratic) nominee,

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(Oct. 2002) (unpublished manuscript) (on file with author). Shepsle, Dickson, and Van Houweling propose a mechanism for achieving equilibrium in a divide-the-dollar game played by a legislative body with staggered terms, Shepsle, Dickson & Van Houweling, *supra*, at 27–28, but their strategy does not appear to apply to a process like the confirmation process.

[76] *See* ROBERT GIBBONS, GAME THEORY FOR APPLIED ECONOMISTS 86 (1992). My skepticism about a potential cooperative equilibrium applies to all Nash equilibria. If, as seems likely, an equilibrium must be "renegotiation proof" in order to be sustainable—meaning multiple players have no incentive to collectively change the rules of the game rather than imposing costly punishments, *see id.* at 86–88—a cooperative equilibrium is even less likely.

[77] *Id.*

[78] *See* Associated Press, *GOP Eyes 'Nuclear Option' for Judges*, NBC NEWS (April 4, 2005, 5:22 PM), https://www.nbcnews.com/id/wbna7384708 [https://perma.cc/8C8E-AHNR].

[79] This helps explain the courtly world of Senate norms described in works like Donald Matthews's *U.S. Senators and Their World*. DONALD R. MATTHEWS, U.S. SENATORS AND THEIR WORLD 92 (1960). Matthews notes that the art of getting ahead in the Senate involves a senator "declining to push his formal powers to the limit." *Id.* at 100–01. A senator's decision not to use her full powers may be rational if it ensures that she can credibly threaten to use those powers against her colleagues if and only if they do something to antagonize her.

senators cannot punish the other party by declining to vote for their nominees. Once the minority party filibusters every bill, it can no longer punish process fouls by threatening to filibuster legislation. At some point, a senator will only be able to threaten other senators by promising to engage in behavior that would be extremely harmful to whoever engages in it, such as voting against an important and broadly popular bill, or shutting down the government for reasons likely to be seen as trivial. A threat that cannot be carried out without serious harm to the threatener is unlikely to be credible.

Of course, reality does not always reflect the logic of game theory. Researchers have found that individuals frequently engage in behavior that is more altruistic or more vindictive than pure self-interest would dictate.[80] However, for present purposes it is sufficient to note that there is some risk senators will act in their own political self-interest when navigating the nominations process.[81] A system built to function if and only if politicians refuse to engage in politics would not be much of a system at all.

The solution to the prisoner's dilemma is suggested by the game's name. Prisoners face their dilemma because any contract not to inform on a co-conspirator would not be judicially enforceable. If the courts would punish Prisoner B for ratting on Prisoner A, both could rationally remain silent and be better off. For senators, as for prisoners, judicial action can solve a collective action problem. The next Part argues such action is consistent with precedent. The following argues it is consistent with principle.

II. PRECEDENT SUPPORTS JUDICIAL ENFORCEMENT OF SENATE NOMINATIONS RULES

The conventional view that congressional rules are not judicially cognizable appears to have prevented litigants from taking rule-related cases to the courts in recent years. But the courts—including the Supreme Court—have seen such cases before. While they have generally declined to decide challenges to *legislation* based on rules violations, they have consistently resolved disputes that turn on congressional rules in other contexts. In this Part, I will first look at judicial opinions related to congressional rules that govern the relationship between a body of Congress, and some non-lawmaker, such as a nominee. Then I will distinguish a separate body of precedent that suggests limitations on judicial involvement in congressional affairs. Finally, I will turn to two bodies of doctrine that are often used to decide when courts may intervene in the internal operations of a coequal branch: the political question and Accardi doctrines.

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[80] *See* COLIN F. CAMERER, BEHAVIORAL GAME THEORY: EXPERIMENTS IN STRATEGIC INTERACTION 48–59 (2011). *See generally* Werner Güth et al., *An Experimental Analysis of Ultimatum Bargaining*, 3 J. ECON. BEHAV. & ORG. 367 (1982).

[81] Güth et al., *supra* note 80, at 368, 385.

A. Smith *and Its Progeny*

1. The Supreme Court

At least at first blush, Supreme Court case law appears crystal clear: Senate nominations rules cases are justiciable. In 1963, the Court went as far as to state, "[i]t has been long settled, of course, that rules of Congress and its committees are judicially cognizable."[82]

In *United States v. Smith*,[83] the Supreme Court considered whether the Senate had the power, under its own rules, to reject a nomination after it had already passed a resolution of confirmation and submitted it to the president.[84] Writing for a unanimous Court, Justice Brandeis reasoned that, because the Court's reading of Senate rules would determine whether Smith's confirmation was valid, "the construction to be given to the rules affects persons other than members of the Senate."[85] Therefore, "the question presented is of necessity a judicial one."[86] He went on to hold that the Senate had violated its own rules.[87]

The Supreme Court has not ruled on the justiciability of Senate confirmation rules since *Smith*, but it has repeatedly reaffirmed the principle articulated in *Smith*, that courts may consider congressional rules. In *Christoffel v. United States*, the defendant had been convicted of perjuring himself before the House Committee on Education and Labor.[88] He argued that his conviction should be overturned because, at the time he perjured himself, the Committee was out of compliance with its own quorum rules.[89] According to the Court, "[t]he question [in the case was] what rules the House has established and whether they have been followed."[90] The Court determined that it could answer such a question. It proceeded to conclude that the House had "acted contrary to the rules and practice of the Congress."[91] It thus held for the defendant.[92]

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[82] Yellin v. United States, 374 U.S. 109, 114 (1963) (citing Christoffel v. United States, 338 U.S. 84 (1949)).

[83] *See generally* 286 U.S. 6 (1932).

[84] *Id.* at 27–28. Chafetz reads *Smith* as deciding only that the Senate could not, by rule, project its power outside the Senate's chamber, in this case purporting to prevent the president from commissioning a nominee that had been confirmed. CHAFETZ, *supra* note 11, at 58. While Chafetz's argument is plausible in theory, it is inconsistent with the language of *Smith*, which expressly asserts judicial power to determine whether a Senate action complies with Senate rules. 286 U.S. at 33 (citing United States v. Ballin, 144 U.S. 1). Further, the rule Chafetz extrapolates from *Smith* cannot be squared with later cases (discussed below) in which Congress was not attempting to regulate conduct outside its walls.

[85] *Smith*, 286 U.S. at 33.

[86] *Id.*

[87] *Id.* at 48.

[88] 338 U.S. 84, 85 (1949).

[89] *Id.* at 85–86.

[90] *Id.* at 88–89.

[91] *Id.* at 90.

[92] *Id.*

Justice Jackson, joined by Chief Justice Vinson and justices Reed and Burton, dissented. But Jackson did not argue that congressional rules are not judicially cognizable.[93] He simply read the relevant rules differently than the majority. According to Jackson, "[t]he House ha[d] adopted the rule and practice that a quorum once established is presumed to continue unless and until a point of no quorum is raised."[94] The Education and Labor Committee had established a quorum prior to Christoffel's testimony, and nobody had raised a point of no quorum. Thus, the Court's determination that no quorum was present ignored a relevant congressional rule, "in effect, invalidat[ing]" that rule.[95] Thus, the case should have been governed by *United States v. Ballin*,[96] which strictly limits judicial invalidation of congressional rules,[97] not by *Smith*. However, Jackson expressly declined to rule out judicial enforcement of congressional rules.[98]

Yellin v. United States[99] echoes *Christoffel*. Edward Yellin was convicted on five criminal counts based on his refusal to answer questions put to him by the House Committee on Un-American Activities.[100] His refusal came after he requested, unsuccessfully, to testify in executive session,[101] attempting to invoke a committee rule requiring an executive session in cases where open testimony might "unjustly injure [the] reputation" of the witness.[102]

The Court began by holding that, "[i]t has been long settled, of course, that rules of Congress and its committees are judicially cognizable."[103] It went on to conclude that the Committee did, in fact, violate its own rules by failing to adequately consider Yellin's request for an executive session.[104] The dissent disputed the majority's interpretation of the relevant congressional rule, while affirming that such a rule must be judicially cognizable.[105]

Smith and its progeny articulate, at the most,[106] one condition for justiciability. Courts can interpret and apply congressional rules only if "the construction to be

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[93] *Id.* at 91.
[94] *Id.* at 95.
[95] *Id.*
[96] 144 U.S. 1 (1892).
[97] *See id.* at 5.
[98] *See id.* at 92.
[99] 374 U.S. 109 (1963).
[100] *Id.* at 111.
[101] *Id.* at 111–12.
[102] *Id.* at 115 (quoting Rule IV of the House Committee on Un-American Activities).
[103] *Id.* at 114 (internal citations omitted).
[104] *Id.* at 123–24.
[105] *Id.* at 143 (White, J., dissenting).
[106] Technically, *Smith* says that a nonmember interest is a sufficient, not necessary, condition for justiciability. And *Christoffel* and *Yellin* contain no nonmember interest requirement. However, the D.C. Circuit has demanded a nonmember interest. *See infra* notes 128–31 and accompanying text.

given to the rules affects persons other than members of the Senate."[107] While the *Smith* Court did not explain what it means for a rule to affect persons other than members of the Senate, the facts of the case help clarify this requirement.

First, the *Smith* line of cases does not limit justiciability to suits brought by nonmembers of the Senate whose rights have been affected by Senate action. *Smith* itself was initiated by the Senate, which asked the district attorney for the District of Columbia to institute a *quo warranto* action[108] to test the validity of Smith's appointment.[109]

Second, *Smith* and its progeny extend justiciability beyond rules that generally protect nonmembers of the Senate. The rule at issue in *Smith* gave the Senate additional opportunities to reject nominees.[110] It was designed to protect the Senate, not the nominee.

Finally, the Supreme Court did not limit justiciability to cases in which a nonmember of Congress experiences a harm as the result of a congressional rules violation. In *Christoffel*, the defendant's rights were not prejudiced by the alleged rules violation.[111] As the *Christoffel* dissent points out—in a conclusion to which the majority does not object—there is no reason to think that the defendant would not have perjured himself had more committee members been present.[112] Similarly, the committee in *Yellin* contemplated whether it was required to consider whether Yellin's testimony could be taken in executive session. It simply failed to consider a set of telegraphs sent to the committee staff. As the dissent points out, nothing in the record indicates that those telegraphs would have made any difference.[113]

2. Interpretation of *Smith* in the Lower Courts

Since *Smith*, the lower courts have not confronted the question of whether a Senate rule governing nominations can be enforced in the courts. However, the few lower court cases that have reason to invoke *Smith* have largely reaffirmed its reasoning with respect to justiciability. In *Wilson v. United States*, the D.C. Circuit

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[107] United States v. Smith, 286 U.S. 6, 33 (1932).

[108] A writ *quo warranto* allows a petitioner to demand that the defendant explain by what authority she holds public office. *See quo warranto*, BLACK'S LAW DICTIONARY (11th ed. 2019). Because in modern times the civil writ has been transformed into a criminal proceeding, *id.*; D.C. CODE ANN. § 16-3501 et seq., the Senate needed the district attorney to act on its behalf to test the validity of Smith's appointment.

[109] *Smith*, 286 U.S. at 29–30. Because the Justice Department had previously taken a position contrary to that of the Senate, the district attorney agreed to file suit only if the Senate used its own counsel and made clear the Justice Department did not support the Senate position. *Id.* at 30.

[110] *Id.* at 30–31.

[111] *See generally* Christoffell v. United States, 338 U.S. 84 (1949).

[112] *Id.* at 91–93.

[113] Yellin v. United States, 374 U.S. 109, 148 (1963). *See* Thomas W. Merrill, *The* Accardi *Principle*, 74 GEO. WASH. L. REV. 569, 577–78 (2006) (noting that the "procedural irregularity" in *Yellin* was not prejudicial).

reversed a contempt conviction that resulted from a referral to prosecutors by the Speaker of the House.[114] According to the Court, the Speaker had not reviewed the contempt citation, as required by statute.[115] As a preliminary matter, the Court wrote, "it may be observed that our consideration of the validity of the Speaker's certification in this case is required in the exercise of our judicial function and is in no sense an invasion of the prerogatives of Congress."[116] It continued, "[t]hat the statute involved is one pertaining to the conduct of the affairs of Congress does not remove its interpretation from the province of the courts. This conclusion follows *a fortiori* from *United States v. Smith*."[117] While *Wilson* involved a statute governing Congress, not a non-statutory Senate rule, the citation to *Smith* suggests that the Court did not distinguish between the two. Notably, while *Wilson* was decided over a dissent, the dissent did not question justiciability.[118]

In *Michel v. Anderson*, members of Congress and private plaintiffs alleged that a House rule allowing delegates from U.S. territories and the District of Columbia to vote in the House's Committee of the Whole unconstitutionally diluted the votes of House members from the states.[119] After rejecting several challenges to its jurisdiction,[120] the D.C. Circuit held that the relevant rule is constitutional. In doing so, it interpreted both the rule and a statute containing an arguably contradictory rule.[121] While the *Michel* Court did not directly address its capacity to enforce congressional rules, it clearly asserted the authority to conclusively interpret them.[122]

In *Randolph v. Willis*, the Southern District of California rejected a claim that Congress had violated its own rules, but only after making clear that such rules do in fact bind Congress.[123] The Court held that:

> [T]he rules of the House which are invoked here nonetheless provide in legal effect legislatively-established due process of law, and the rules of the Committee itself provide in legal effect administratively-established due process of law, for the benefit of all witnesses appearing before the Committee, or any subcommittee thereof; and such rules have the same force of law, and are equally binding upon the Committee members, the Committee staff, and witnesses as well.[124]

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[114] 369 F.2d 198, 200 (D.C. Cir. 1966).
[115] *Id.* at 199–200.
[116] *Id.* at 200.
[117] *Id.* (citation omitted).
[118] *Id.* at 205–08 (Danaher, J., dissenting).
[119] 14 F.2d 623, 624 (D.C. Cir. 1994).
[120] *Id.* at 625–28.
[121] *Id.* at 628–30.
[122] *Id.* at 627.
[123] 220 F. Supp. 355, 360 (S.D. Cal. 1963).
[124] *Id.* at 358.

Similarly, *Smith* is discussed in a series of recent lower court cases in which litigants attempt to use the case as authority to challenge the constitutionality of congressional procedures.[125] In these cases, courts have recognized that *Smith* explicitly did not address the question of whether a congressional rule complies with the Constitution or any other laws or principles.[126] While these cases decline to extend *Smith*, they in no way limit it. In fact, the cases reaffirm courts' ability to adjudicate disputes that relate "to the construction of the applicable rules, not to their constitutionality."[127]

3. Nominee Benefit Cases

All of the cases discussed so far have one thing in common: they involve situations in which Congress took an action adverse to the interests of a nonmember of Congress. This raises the question of whether the courts may adjudicate a case in which Congress has unlawfully *benefited*, not harmed, a nominee.[128]

At least one appellate opinion suggests that nominee benefit cases are not justiciable. In dicta in *Metzenbaum v. Federal Energy Regulatory Commission*, the D.C. Circuit summarizes *Smith*, *Christoffel*, and *Yellin* as allowing "judicial intervention where rights of persons other than members of Congress are jeopardized by

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[125] *See, e.g.*, Patterson v. U.S. Senate, 667 F. App'x. 962 (9th Cir. 2016); Common Cause v. Biden, 909 F. Supp. 2d 9, 30 n.18 (D.D.C. 2012). *See generally* Schonberg v. McConnell, No. 13-CV-00220, 2013 WL 6097890 (W.D. Ky. Nov. 20, 2013).

[126] *Common Cause*, 909 F. Supp. 2d at 30 n.18.

[127] *Id.* at 30 n.16 (quoting United States v. Smith, 286 U.S. 6, 33 (1932)). *Vander Jagt v. O'Neill*, involved an alleged constitutional violation, not a violation of congressional rules. 699 F.2d 1166 (D.C. Cir. 1983). The D.C. Circuit's reasoning in the case is nonetheless relevant. The Court rejected, under its doctrine of equitable discretion, claims by members of Congress that the House had unlawfully denied them seats on House committees and subcommittees. However, it first reasoned that "it is not evident why we must treat congressional rules with 'special care,' or with more than the customary deference we show other legislative enactments." *Id.* at 1173. To the contrary,

> [b]ecause of the position taken in *Ballin*, which apparently was adopted by Justice Brandeis writing for the Supreme Court in *United States v. Smith*, we conclude that Art. I simply means that neither we nor the Executive Branch may tell Congress what rules it must adopt. Article I does not alter our judicial responsibility to say what rules Congress may not adopt because of constitutional infirmity.

Id. While the D.C. Circuit does not spell out the implications of its reasoning for cases that involve the interpretation, not the constitutionality, of congressional rules, it suggests that such rules should be given the same treatment as statutes, which are routinely interpreted and applied by courts.

[128] Note that even if courts can only adjudicate cases in which a rules violation has harmed a nominee, many nominations rules—including the rule I use as an example, see *supra* Part I—could be enforced in the courts.

congressional failure to follow its own procedures."[129] The rule, as articulated in *Metzenbaum*, cannot be squared with the cases the D.C. Circuit purports to summarize.[130] *Smith* says clearly that when "the construction to be given to the rules *affects* persons other than members of the Senate, the question presented is *of necessity* a judicial one."[131] By its terms, the rule from *Smith* would render justiciable cases in which Congress has benefited a nominee in violation of a congressional rule, since in such a case the construction of the relevant rule would clearly "affect" the nominee.

Christoffel and *Yellin* give the courts even more authority to adjudicate nominations rule cases. In *Christoffel*, the Court nowhere discussed the circumstances under which congressional rules are judicially cognizable; it simply decided the case at bar.[132] And *Yellin* is even broader than *Smith*. It states simply that "rules of Congress and its committees are judicially cognizable,"[133] with no mention of the need for a nonmember injury.

At most, one could argue that the language in *Smith* and *Yellin* allowing broad justiciability is dicta. In theory, the Supreme Court could have resolved both cases without laying down a rule to govern cases in which Congress violates its own rules and thereby benefits a nominee. But the Court did not do so. The relevant language in *Smith* is not just included in the holding on justiciability; it *is* the holding.[134] If the sentence quoted above were removed, the opinion would be silent on the question of justiciability.[135] The same goes for the language from *Yellin*.[136] If the D.C. Circuit faces a nominee benefit case, it should follow the broad justiciability standard articulated by the Supreme Court and not the narrow one from the *Metzenbaum* dicta.

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[129] 675 F.2d 1282, 1287 (D.C. Cir. 1982). *Metzenbaum* involved a rule governing legislation, not nominations. *Id.* at 1284–87.

[130] *Id.* at 1284, 1291.

[131] 286 U.S. at 33 (emphasis added).

[132] *See generally* Christoffel v. United States, 338 U.S. 84 (1949).

[133] Yellin v. United States, 374 U.S. 109, 114 (1963).

[134] *Smith*, 286 U.S. at 33 ("[When] the construction to be given to the rules affects persons other than members of the Senate, the question presented is of necessity a judicial one.").

[135] *See id.* at 33.

[136] Even if the courts were to hold that congressional rules cases are justiciable only when a non-legislator has been harmed, nominee benefit cases are not completely foreclosed. A court could easily conclude, for example, that a litigant adversely affected by the action of an unlawfully appointed official has been harmed by Congress's failure to follow its rules. *Cf.* NLRB v. Noel Canning, 573 U.S. 513, 550 (2014) (adjudicating case of litigant harmed by the action of an adjudicatory body whose members were appointed in violation of the Appointments Clause). In this case, the justiciability analysis merges into the standing analysis, as any litigant with standing would presumably have sufficient injury to compel the courts to hear her claim. This approach is arguably consistent with the judicial trend towards using standing in lieu of other potential mechanisms for limiting access to the courts. *See generally* Linda Sandstrom Simard, *Standing Alone: Do We Still Need the Political Question Doctrine?*, 100 DICK. L. REV. 303 (1995) (noting that "[a]s the Court has heightened standing requirements to deny judicial review to a broader range of cases, it has found little need to invoke the political question doctrine").

B. The Field *Line of Cases*

The cases discussed above give the judiciary a robust role in adjudicating disputes that turn on congressional rules. However, another line of cases suggests a far more limited approach.[137] *Marshall Field & Co. v. Clark*[138] articulates what has come to be known as the "Enrolled Bill Doctrine."[139] Under this rule, courts will not question whether Congress has duly passed a piece of legislation if a document containing the bill's text has been signed by the Speaker of the House and the President of the Senate.[140]

In *Field*, Marshall Field & Co. alleged that a statute:

> appearing, upon its face, to have become a law in the mode prescribed by the Constitution, [should] be deemed an absolute nullity, in all its parts, because . . . a section of the bill, as it finally passed, was not in the bill authenticated by the signature of the presiding officers of the respective houses of Congress, and approved by the President.[141]

The Court rejected the claim, relying on two considerations.[142] First, the Court expressed concern regarding the "consequences that must result" if it chose to question the validity of a law, "on which depend public and private interests of vast magnitude," that appears valid on its face.[143] I will call this the reliance argument. And second, the Court concluded that "[t]he respect due to coequal and independent

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[137] One additional Supreme Court case limits the scope of judicial power in this area, but not by rendering congressional rules cases nonjusticiable. In *Wheeldin v. Wheeler*, the Supreme Court declined to hold that the congressional subpoena statute creates an implied private right of action for damages. 373 U.S. 647, 651–52 (1963). Nothing in *Wheeldin* undercuts the courts' ability to adjudicate a case involving congressional rules when Congress has expressly created a cause of action or when the validity of a congressional action is relevant to a suit arising under another statute.

[138] 143 U.S. 649 (1892).

[139] *See generally* Bar-Siman-Tov, *Legislative Supremacy*, *supra* note 14, at 325.

[140] *Field*, 143 U.S. at 672.

[141] *Id.* at 668–69.

[142] My analysis reflects in part the interpretation given to *Field* by later lower court cases. *See, e.g.*, Pub. Citizen v. U.S. Dist. Ct. for D.C., 486 F.3d 1342, 1349–50 (D.C. Cir. 2007); OneSimpleLoan v. U.S. Sec'y of Educ., 496 F.3d 197, 205 (2d Cir. 2007). *Field* could be read to stand simply for the proposition that nothing in the Constitution's Journals Clause requires any claim regarding legislative action to be substantiated by evidence regarding congressional journals. *See* 143 U.S. at 67l, 673–74. However, this reading has been rejected by the lower courts. *See Pub. Citizen*, 486 F.3d at 1350–55; *OneSimpleLoan*, 496 F.3d at 204–05. And appropriately so. The fundamental claim in *Field* was that the statute had not gone through the constitutionally required procedure to become a law. In refusing to consider that claim—in the face of evidence from the congressional journals as well as other evidence—the *Field* Court did more than issue an evidentiary rule. It rejected an entire line of inquiry.

[143] *Field*, 143 U.S. at 670.

departments requires the judicial department to act upon" the assurance of Congress's presiding officers that a bill has been duly passed.[144] I will call this the respect argument.

When *Field* is described in this way, its holding appears to be in tension with the *Smith* Court's conclusion that courts may invalidate an act of Congress that violates congressional rules, even when the relevant presiding officer claims that the act is valid. However, while the Supreme Court has never spelled out how *Smith* and *Field* can coexist, *Field* can be squared with *Smith* in at least three ways.

1. Distinguishing Nominations Rules from Rules Governing Lawmaking

First, *Field*, by its terms, applies only to legislative actions.[145] It has never been applied to nominations.[146] Indeed, the same day that the Court handed down *Field*, it also decided *Ballin*, which leaves a role for the courts in evaluating Congress's internal deliberations.[147] While *Ballin* deals with courts' authority to determine the validity, not the interpretation, of congressional rules, it makes clear that the Court, as it stood in 1892, had no intention of ruling out judicial intervention in congressional procedures.[148] *Smith*, with its express provision for judicial consideration of a nominations rule, came after *Field*, and does not discuss the earlier case. The Court has always thought that *Field*'s enrolled bill doctrine can coexist with some judicial evaluation of congressional procedure, and since 1932 it has held that such evaluation can include determining whether the Senate complied with a nominations rule.[149]

Smith and its progeny provide a compelling reason to distinguish between nominations and legislation. As discussed above, these opinions repeatedly state that courts have jurisdiction to adjudicate congressional rules cases when "the construction to be given to [congressional] rules affects persons other than members of the Senate."[150] Congressional rules governing nominations affect "persons other than

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[144] *Id.* at 672.

[145] *Id.* at 672. *Field* has been applied in a case involving adoption of a constitutional amendment, *see* Leser v. Garnett, 258 U.S. 130, 137 (1922), but that process has far more in common with the lawmaking process than the judicial nominations process.

[146] The Supreme Court's only discussion of the Enrolled Bill Doctrine in the nominations context came in *National Labor Relations Board v. Noel Canning*. 573 U.S. 513 (2014). The Court noted that it will "generally take at face value the Senate's own report of its actions." *Id.* at 551. However, if the Senate claims to be in session but is not capable of conducting business, its claim will be rejected. *Id.* at 551–52. By indicating it will reject the Senate's interpretation of its actions if that interpretation is legally incorrect, the Court suggested that when nominations and not legislation is at issue, it will not take the extremely deferential approach it took in *Field*.

[147] *See generally* United States v. Ballin, 144 U.S. 1 (1892).

[148] *Id.* at 1.

[149] *See* United States v. Smith, 286 U.S. 6 (1932).

[150] *Id.* at 33; *see also* Christoffel v. United States, 338 U.S. 84, 88 (1949); Yellin v. United States, 374 U.S. 109, 143 (1963).

members" directly and concretely, by determining the conditions under which a nominee can serve.[151] By contrast, rules governing the legislative process affect nonmembers only indirectly.[152] Once a statute is passed it must still be signed, enforced, and adjudicated before it alters the rights of members of the public.

This distinction between nominations and legislation relates directly to the dual rationale for *Field*.[153] First, a nomination does not give rise to the same reliance interest for the public[154] that legislation does. When a bill is enacted, individuals and firms frequently incur costs to ensure that their conduct complies with the new law.[155] As a result, a statute may produce significant effects before it results in the kind of direct, concrete impact that would allow for a challenge to the process by which the statute was enacted.[156] By contrast, the precise impact of any one nomination will generally be too uncertain to engender significant changes in private behavior before the nominee has acted, and her action can be challenged. Thus, the reliance rationale for *Field* has considerably less force when applied to a nomination than to legislation.

Judicial policing of the nominations process is also less of an incursion into Congress's business—and therefore less disrespectful of a coequal branch—than judicial policing of the lawmaking process. In a case involving a judicial nomination, the courts are not intervening in a process squarely committed to the legislative branch. They are mediating an interaction between Congress, the nominating president, and the nominee.[157]

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[151] *Smith*, 286 U.S. at 33.

[152] *See id.* at 33.

[153] *See* Field v. Clark, 143 U.S. 649, 672–73 (1982).

[154] Note that while statutes have a more immediate impact on the general public, nominations rules have a more direct impact on a particular nominee. Hearing cases involving the former not the latter is therefore consistent with the general view that courts focus on the rights of individuals, not broad policy questions. *See* Lujan v. Defs. of Wildlife, 504 U.S. 555, 576 (1992); Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 SUFFOLK U. L. REV. 881, 894 (1983).

[155] *See* Cass R. Sunstein, *Deregulation and the Hard-Look Doctrine*, 1983 SUP. CT. REV. 177, 205 (1983); James Bradley Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129, 135–36 (1893).

[156] The availability of declaratory judgments and injunctions against the enforcement of invalid statutes provides some ability for regulated entities to invalidate a statute before it has been enforced. However, a statute may nonetheless reshape private conduct before anybody experiences a harm that is sufficiently "concrete and particularized" and "actual or imminent," Spokeo, Inc. v. Robins, 136 S. Ct. 1540, 1548 (2016), to give rise to standing. Further, *Field* was handed down before the 1934 passage of the Declaratory Judgment Act, which provided greater certainty regarding the availability of declaratory judgments. *See* Edwin Borchard, *The Federal Declaratory Judgments Act*, 21 VA. L. REV. 35, 38 (1934); *see also id.* at 49 (highlighting relevance for constitutional cases).

[157] Foreign scholarship about judicial review also recognizes a distinction between matters of "internal housekeeping," on the one hand, and legislative proceedings that substantially affect nonmembers, on the other. *See* Bar-Siman-Tov, *Legislative Supremacy*, *supra* note 14,

2. *Field*'s Language About Respect for a Coequal Branch Reflects Facts Specific to the Situation in *Field*

The *Smith* and *Field* lines of cases can also be reconciled by recognizing limits articulated in *Field* that have been highlighted by more recent Supreme Court precedent. It is true that the *Field* Court was persuaded, at least in part, by the reliance and respect arguments discussed in *Field* and later cases.[158] It is equally true that these arguments will not always trump contrary considerations. Every time the courts invalidate an act of Congress, they upset settled expectation[159] and, in a sense, show disrespect for a coordinate branch. Nevertheless, invalidating laws has long been considered part of the courts' constitutional function.[160] The Court has even made clear that judges may sometimes "delve into a legislature's record" to determine whether a legislative act "complied with all the requisite formalities," without impermissibly disrespecting Congress.[161]

The *Field* Court's concern about disrespecting Congress is best understood as arising from a particular aspect of the situation presented in *Field*. To consider a challenge to the statute at issue in *Field*, the Court had to treat Congress as either a fool or a knave.[162] In explaining why adjudicating the case would show disrespect for Congress, the Court noted that if the asserted discrepancy between the House and Senate passed bills was more than a clerical error, then a number of congressional officials and clerks were guilty of a "deliberate conspiracy" to subvert the democratic process.[163] The Court declined to consider such an explosive possibility.[164] The

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at 383; Katherine Swinton, *Challenging the Validity of an Act of Parliament: The Effect of Enrolment and Parliamentary Privilege*, 14 OSGOODE HALL L.J. 345, 392 (1976).

[158] *See Field*, 143 U.S. at 672–77.

[159] In fact, judicial invalidation of statutes on substantive constitutional grounds is likely to be more disruptive than invalidation on procedural grounds. If a court invalidates a statute on procedural grounds, Congress can pass it again using the correct procedure. *See generally* Bar-Siman-Tov, *Legislative Supremacy*, *supra* note 14, at 384; A. Christopher Bryant & Timothy Simeone, *Remanding to Congress; The Supreme Court's New "On the Record" Review of Federal Statutes*, 86 CORNELL L. REV. 328, 395 (2001). If a court wishes to avoid even a temporary disruption, it can stay its ruling to give Congress time to redo its work. Bar-Siman-Tov, *Legislative Supremacy*, *supra* note 14, at 388.

[160] *See* United States v. Munoz-Flores, 495 U.S. 385, 390–91 (1990); Louis Henkin, *Is There a "Political Question" Doctrine?*, 85 YALE L.J. 597, 600 (1976).

[161] Baker v. Carr, 369 U.S.186, 214–15 (1962). While the *Baker* Court invited such delving as a means of validating a law, *id.*, *Munoz-Flores* confirms that if a judicial inquiry reveals an invalid law, the Court will sometimes have to say so, 495 U.S. at 390–91.

[162] *See Field*, 143 U.S. at 672–74.

[163] *Id.* at 672–73. Later judicial discussion of *Field* highlights the fact that judicial action in that case would have involved questioning Congress's "good faith." *See, e.g.*, Zivotofsky v. Clinton, 566 U.S. 189, 205 (2012) (Sotomayor, J. concurring).

[164] 143 U.S. at 672–73. The Second Circuit later made this more explicit and declined to

Court could also have said that if the discrepancy *was* the result of a clerical error, judicial action might still be inappropriate. In that case, treating the discrepancy as a good reason for invalidating the statute would put the courts in the position of Congress's hall monitor, nitpicking Congress's innocent mistakes.

By contrast, courts have taken a different approach when faced with procedural infirmities that can be described as something other than mere mistakes or vile conspiracies. For example, in *United States v. Munoz-Flores*, the Court held that an Origination Clause[165] challenge to a special assessment on certain criminals was justiciable.[166] While the *Munoz-Flores* Court does not discuss *Field* extensively, in a footnote it states that "[w]here, as here, a constitutional provision *is* implicated, *Field* does not apply."[167] As the lower courts have pointed out, the *Munoz-Flores* footnote is "cumbersome"[168] and "ambiguous."[169] *Field* itself implicated a constitutional provision, the requirement that the House and Senate both pass an identical bill before it can become law.[170] However, there is a meaningful difference between the constitutional question in *Munoz-Flores*, and the question in *Field*. Congress could plausibly violate the Origination Clause on the good faith, but incorrect, belief that it had complied with the clause as properly understood. In that case, by interpreting and enforcing the clause, the courts would be fulfilling their duty to "say what the law is,"[171] not showing disrespect for a coordinate branch.

Judicial enforcement of Senate nominations rules does not treat the Senate as either a fool or a knave. Just as courts are called on to interpret statutes without the implication that any alleged violation was necessarily in bad faith, courts may be called on to interpret Senate rules simply to provide an authoritative interpretation reached through a rigorous and neutral process. If anything, the courts would show greater disrespect for the Senate if they refused to enforce a Senate rule after the Senate indicated it intended that rule to be binding in any judicial proceeding.

3. *Field* Only Provides a Default Rule

Finally, the *Smith* and *Field* lines can be reconciled because *Field* only establishes a default rule. In the absence of congressional action, courts will not question the validity of a statute signed by the relevant congressional leaders. But Congress (or a legislature in cases involving state law) is perfectly free to invite judicial inquiry into the validity of a statute, and the courts will accept the invitation.

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consider the possibility of such a conspiracy even when it was alleged in the pleadings. OneSimpleLoan v. U.S. Sec'y of Educ., 496 F.3d 197, 208 (2d Cir. 2007).

[165] U.S. CONST. art I, § 7, cl. 1 (requiring bills for raising revenue to originate in the House).

[166] 495 U.S. 385, 389–96 (1990).

[167] *Id.* at 391 n.4.

[168] Pub. Citizen v. U.S. Dist. Ct. D.C., 486 F.3d 1342, 1354 (D.C. Cir. 2007).

[169] *Id.* at 1355.

[170] *See* U.S. CONST. art. I, §§ 1, 7, cl. 2 (bicameralism requirement).

[171] Marbury v. Madison, 5 U.S. 137, 177 (1803).

The *Field* Court limited its holding by distinguishing cases in which the relevant legislative body had passed "constitutional or statutory provisions [that] expressly, or by necessary implication, required or authorized the court to go behind the enrolled act when the question was, whether the act, as authenticated and deposited in the proper office, was duly passed by the legislature."[172] Later Supreme Court opinions make this limitation even clearer. In *Harwood v. Wentworth*, the Court points out:

> [I]f the principle announced in *Field v. Clark* involves any element of danger to the public, it is competent for Congress to meet that danger by declaring under what circumstances, or by what kind of evidence, an enrolled act of Congress or of a territorial Legislature, authenticated as required by law, and in the hands of the officer or department to whose custody it is committed by statute, may be shown not to be in the form in which it was when passed by Congress or by the territorial Legislature.[173]

In other words, Courts may face two different kinds of rules. Primary rules, such as the Constitution's bicameralism requirement, lay down the requirements for a bill to become a law. These rules do not spell out how courts should determine whether the rules have been followed. Thus, courts have no basis to reject the validity of legislation when Congress's presiding officers assert that such legislation has complied with the primary rules.

By contrast, secondary rules tell courts how they should determine whether a primary rule has been followed. For example, a secondary rule could dictate that a statute must be read three times before it receives a majority vote, and that this process must be documented.[174] In that case, the courts would apply the secondary rule, and invalidate any legislation inconsistent with it.

In short, courts must enforce secondary rules—rules that specify how legislatures demonstrate compliance with primary rules like the bicameralism and presentment requirement—but they cannot write their own. That is why the *Harwood* Court

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[172] Field v. Clark, 143 U.S. 649, 678 (1892)*; see also* OneSimpleLoan v. U.S. Sec'y of Educ., 496 F.3d 197, 208 (2d Cir. 2007).

[173] Harwood v. Wentworth, 162 U.S. 547, 560 (1896). This caveat is echoed in *Twin City Bank v. Nebeker*. 167 U.S. 196, 201–02 (1897); *see also* Fisk & Chemerinsky, *supra* note 57, at 226.

[174] *See Field*, 143 U.S. at 678 (first discussing Spangler v. Jacoby, 14 Ill. 297 (1853); then discussing Turley v. County of Logan, 17 Ill. 151 (1855); then discussing Prescott v. Canal Trustees, 19 Ill. 324 (1857); then discussing Supervisors v. People, 25 Ill. 181 (1860); then discussing Ryan v. Lynch, 68 Ill. 160 (1873); and then discussing People v. Barnes, 35 Ill. 121 (1864)).

could proclaim that if the *Field* rule creates a problem, Congress has the power to solve it.[175]

As a result, even under the *Field* line of cases, Congress can invite judicial scrutiny of its actions when it chooses to do so. Thus, *Smith* could be understood as a situation in which the Senate, by adopting the Senate rule at issue in that case, took *Harwood*'s invitation to "declar[e] under what circumstances" its actions should be considered legitimate.[176] More to the point, *Field* imposes no impediment to Congress adopting a rule and making clear it intends that rule to be enforced by the courts.

C. The Political Question Doctrine Poses No Barrier to Judicial Enforcement of Nominations Rules

Professor Aaron-Andrew Bruhl has written that "[f]or any well-socialized lawyer, a lawsuit trying to compel the Senate to follow certain procedures for considering a judicial nomination naturally and properly brings to mind the political question doctrine."[177] The doctrine should not be oversold. The Supreme Court has relied on it just three times since 1960,[178] and the Court has recently emphasized its narrowness.[179] However, any thorough consideration of the judicial role in enforcing congressional rules must consider it.

Smith and *Christoffel* nowhere discuss the doctrine, which achieved its modern form after those cases were decided. *Yellin*, which was handed down the year after the Supreme Court described the doctrine in *Baker v. Carr*,[180] does not cite that opinion. The doctrine seems clearly relevant to nominations rules cases, but the courts have not clarified how.[181]

For more than half a century, the political question doctrine has been analyzed in terms of the well-known six factor test articulated in *Baker v. Carr*.[182] Under the *Baker* test:

> Prominent on the surface of any case held to involve a political question is found [1] a textually demonstrable constitutional

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[175] *Harwood*, 162 U.S. at 560; *see also Twin City Bank*, 167 U.S. at 201–02.

[176] *Harwood*, 162 U.S. at 560.

[177] Bruhl, *supra* note 11, at 973.

[178] *See generally* Nixon v. United States, 506 U.S. 224 (1993); Gilligan v. Morgan, 413 U.S. 1 (1973); Rucho v. Common Cause, 139 S. Ct. 2484 (2019). Through the history of the doctrine, it has been employed only in unusual circumstances. *See* JEFFREY A. SEGAL & HAROLD J. SPAETH, THE SUPREME COURT AND THE ATTITUDINAL MODEL REVISITED 178 (1993).

[179] *See* Zivotofky v. Clinton, 566 U.S. 189, 195–205 (2012).

[180] 369 U.S. 186 (1962).

[181] A partial exception is *Metzenbaum v. Federal Energy Regulatory Commission*, which relies on the political question doctrine. 675 F.2d 1282, 1287 (D.C. Cir. 1982). However, *Metzenbaum* did not involve nominations rules. *Id.* at 1284–86. *See supra* notes 129–36 and accompanying text.

[182] *See generally* 369 U.S. at 186.

> commitment of the issue to a coordinate political department; or [2] a lack of judicially discoverable and manageable standards for resolving it; or [3] the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or [4] the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or [5] an unusual need for unquestioning adherence to a political decision already made; or [6] the potentiality of embarrassment from multifarious pronouncements by various departments on one question.[183]

More recently, the Supreme Court appears to have altered this analysis. In *Zivotofsky v. Clinton*,[184] the Court discussed only the *Baker* test's first two prongs.[185] While it would be premature to ignore the other *Baker* factors, the Court appears to have substantially diminished their importance.[186]

1. Textual Commitment

To understand why adjudication of nominations rules disputes is not textually committed to Congress, it is important to keep in mind that the political question doctrine is "one of 'political questions,' not one of 'political cases.'"[187] Courts will

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[183] *Id.* at 217.

[184] 566 U.S. 189 (2012).

[185] *Id.* at 195; *see* Chris Michel, *There's No Such Thing as a Political Question of Statutory Interpretation: The Implications of* Zivotofsky v. Clinton, 123 YALE L.J. 253, 256 n.19 (2013). The Court's only political question ruling since *Zivotofsky*, Rucho v. Common Cause, 139 S. Ct. 2484 (2019), also ignores the latter four *Baker* factors, though this may be due to the particular relevance of the second factor to that case, which turned on the existence of judicially manageable standards for evaluating redistricting plans. Even before *Zivotofsky*, scholars argued that only the first two *Baker* factors should be taken seriously. *See* Mark Tushnet, *Law and Prudence in the Law of Justiciability: The Transformation and Disappearance of the Political Question Doctrine*, 80 N.C. L. REV. 1203, 1213 (2002). Indeed, the Court in *Nixon v. United States* relied only on the first two factors, though it was "persuaded that the lack of finality and the difficulty of fashioning relief counsel against justiciability," 506 U.S. 224, 236 (1993). Lower courts have continued to mention all the *Baker* factors. *See, e.g.*, Al-Tamimi v. Adelson, 916 F.3d 1, 5 (D.C. Cir. 2019); Nat'l Urb. League v. Ross, 977 F.3d 698, 708 n.8 (9th Cir. 2020); Aviation & Gen. Ins. Co., Ltd. v. United States, 882 F.3d 1088, 1094–95 (Fed. Cir. 2018); Kuwait Pearls Catering v. Kellogg Brown & Root, 853 F.3d 173, 178–79 (5th Cir. 2017); Al Shimari v. Caci Premier Tech., Inc., 758 F.3d 516, 531 (4th Cir. 2016); Kerr v. Hickenlooper, 744 F.3d 1156, 1174 (10th Cir. 2014); NLRB v. New Vista Nursing & Rehab., 719 F.3d 203, 215 (3d Cir. 2013). *But see In re* KBR, Inc., 893 F.3d 241, 259 (4th Cir. 2018) (mentioning only first two factors). However, in only one case has a circuit court relied on any but the first two. *See infra* notes 245–47 and accompanying text.

[186] *See Al-Tamimi*, 916 F.3d at 12; Ctr. Biological Diversity v. Mattis, 868 F.3d 803, 824 (9th Cir. 2017).

[187] *Baker*, 369 U.S. at 217.

not answer questions that have been textually committed to a political branch, but they may adjudicate cases to which those questions are relevant. This distinction was on display most recently in *Zivotofsky*. In that case, the Supreme Court did not dispute the district court's determination that the political status of Jerusalem is a political question.[188] It nonetheless concluded that once that question had been answered by Congress, the courts could engage in the "familiar judicial exercise" of determining whether a statute was constitutional.[189]

In determining what question, if any, has been committed to a political branch, we can usefully distinguish between three possibilities. The first two are straightforward. The Constitution may grant a political branch power to write rules (lawmaking power) or to interpret and apply them (adjudicatory power). In *Powell v. McCormack*, the Court held that while the House of Representatives might have sole authority to "judge" the qualifications of its members, it had no authority to add qualifications to the list already provided in the Constitution.[190] A grant of adjudicatory authority does not imply a grant of related lawmaking authority. The case that a grant of lawmaking power does not imply a grant of related adjudicatory authority, much less sole adjudicatory authority, is even easier to make. After all, Article I grants Congress the authority to pass statutes, and nobody thinks statutory cases can be tried by Congress.[191] A rule that statutory cases are nonjusticiable would contradict our whole system.[192]

The Framers took this distinction between adjudicatory and lawmaking authority seriously. At one point during the Constitutional Convention, James Madison objected to a provision "that each House should be judge of the privileges of its own members."[193] He:

> distinguished between the power of judging of privileges previously & duly established and the effect of the motion which would give a discretion to each House as to the extent of its own privileges. He suggested that it would be better to make provision for ascertaining by *law*, the privileges of each House, than to allow each House to decide for itself.[194]

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[188] Zivotofsky v. Clinton, 566 U.S. 189, 196 (2012).

[189] *Id.*

[190] 395 U.S. 486, 548 (1969).

[191] *Cf.* United States v. Klein, 80 U.S. 128, 146 (1872) (limiting Congress's ability to prescribe "rules of decision" to micromanage judicial activity).

[192] *Cf.* Nixon v. United States, 506 U.S. 224, 240 (1993) (White, J., concurring) ("There are numerous instances of this sort of textual commitment, *e.g.*, Art. I, § 8, and it is not thought that disputes implicating these provisions are nonjusticiable."); *id.* at 242 (noting that the Constitution's commitment of "all legislative powers" to Congress does not preclude judicial consideration of the scope of that power).

[193] 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 502 (Max Farrand ed., rev. ed. 1966), *quoted in* CHAFETZ, *supra* note 11, at 66.

[194] *Id.* at 502–03.

Madison's objection carried the day. The language was ultimately replaced with a provision privileging lawmakers from arrest under specified circumstances but without allowing them to determine the scope of that privilege.[195] Congress got the authority to apply the law but not to write it.

The third category of authority provided by the Constitution might be called "responsibility-based" power. Article IV, Section 4, for example, does not clearly provide either lawmaking or adjudicatory authority. It simply gives Congress responsibility for guaranteeing a republican form of government and protecting states from invasion and (under specified circumstances) insurrection.[196] In *Luther v. Borden*, the Court famously held that cases brought under this provision present a political question.[197] Litigants sought a determination as to which of two competing Rhode Island factions was the lawful government and which was an unlawful insurgent.[198] The case thus implicated, according to the Court, Congress's responsibility for guaranteeing a republican form of government and for protecting states from "domestic violence."[199] These dual responsibilities require Congress to determine which is the lawful government in a particular state.[200]

The Court reasoned that Congress has two mechanisms for indicating which government it considers lawful. On the one hand, it can indicate a state's government is lawful by allowing its congressional delegation to be seated, but in the Rhode Island case too little time had elapsed since the insurrection for Congress to have made any decision about seating the state's delegation.[201] On the other hand, Congress can use its power under the insurrection clause to intervene against an insurrectionary government, and therefore necessarily determine which government is insurrectionary and which is legitimate.[202]

Congress, according to the Court, could "determine upon the means proper to be adopted to fulfil [its responsibility for protecting the states from insurrection]. They might, if they had deemed it most advisable to do so, have placed it in the power of a court to decide when" an insurrection is underway.[203] Instead, Congress tasked the president with putting down insurrections, and therefore with implicitly deciding on the legitimacy of state governments. Since Congress's scheme for determining the legitimacy of state governments created no role for the courts, the courts could not interfere.

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[195] *See* U.S. CONST. art. I, § 6, cl. 1.

[196] The clause does not specifically mention Congress, but it has been interpreted to task that branch specifically. *See* Luther v. Borden, 48 U.S. 1, 46–47 (1849).

[197] *Id.*

[198] *See id.* at 35.

[199] *Id.* at 42.

[200] *Id.*

[201] *Id.*

[202] *Id.* at 42–43.

[203] *Id.* at 43.

The Court thus made clear that Congress could have given the courts a role, even in a matter as sensitive as determining the lawfulness of a state government. What exactly this would look like became clear in *Texas v. White*.[204] In that case, the Court determined whether the government of Texas—seeking to reassert its sovereignty after losing recognition when it seceded from the Union—was a valid state government.[205] While the Court reiterated *Luther*'s conclusion that enforcement of Article IV, Section 4 is a matter for Congress,[206] it explained that Congress has "a discretion in the choice of means" for carrying out its Guarantee Clause responsibilities.[207] Following the Civil War, Congress exercised that discretion by passing a series of statutes establishing criteria for determining when state governments could be recognized as lawful.[208] The Court would apply those statutes, not dismiss the case.[209]

Other constitutional provisions follow this responsibility-based logic, and the courts have allowed Congress discretion in the choice of means for carrying out its responsibilities. In *Coleman v. Miller*, the Court held that Congress, and not the courts, must decide whether a proposed constitutional amendment has been ratified too slowly.[210] Congress can proceed case-by-case, as it did when it specifically proclaimed that the Fourteenth Amendment had been ratified.[211] But if Congress

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[204] *See generally* 74 U.S. 700 (1869).

[205] *Id.* at 731–32.

[206] *Id.* at 730.

[207] *Id.* at 729.

[208] *Id.* at 730–31.

[209] The Court also ignored the fact that Congress had refused to seat Texas's representatives, *id.* at 738 (Grier, J., dissenting), suggesting that when Congress speaks to a question in general terms the Court will not defer to a subsequent case-by-case congressional determination on the same question. The Court took an unusual approach to interpreting the relevant statutes in *Texas*. As the Court recognized, Congress's first act speaking to the validity of the Texas government rejected it. *Id.* at 730–31. The Court nonetheless concluded that "the terms of the acts necessarily imply recognition of actually existing governments; and that in point of fact, the governments thus recognized, in some important respects, still exist." *Id.* at 731. The Court did not make clear why this is so, and the dissent reached the opposite conclusion. *Id.* at 738 (Grier, J., dissenting). For criticism of the Court's reasoning, see Oliver P. Field, *Doctrine of Political Questions in the Federal Courts*, 8 MINN. L. REV. 485, 507–08 (1924); Fritz W. Scharpf, *Judicial Review and the Political Question: A Functional Analysis*, 75 YALE L.J. 517, 591 (1966). Nonetheless, the Court's odd statutory interpretation does not undermine the conclusion that even when Congress has exclusive authority to answer some questions, the courts may play a role in applying Congress's answers to relevant cases.

[210] 307 U.S. 433, 450 (1939).

[211] *Id.* at 449–50. This part of *Coleman* has been challenged, with some commentators questioning whether *Coleman*'s central political question doctrine holding is still good law. *See* Congressional Pay Amendment, 16 Op. O.L.C. 85, 101–02 n.23 (1992) and sources cited. Further, the Court did not mention *Coleman* in its latest political question decision. *See generally* Rucho v. Common Cause, 139 S. Ct. 2484 (2019). If *Coleman* has been left behind, it is even clearer that responsibility-based constitutional grants of authority do not preclude a judicial role.

chooses to exercise its power by passing legislation specifying how long states have to ratify an amendment, the Court made clear, it would treat that requirement as binding, just as it had in *Dillon v. Gloss*[212].[213]

In *Foster v. Neilson*, the Court held that it was for Congress to determine which lands had been transferred to the United States by virtue of the Treaty of San Ildefonso.[214] It could address land disputes individually, exercising an essentially adjudicatory function.[215] But given that Congress had decided to address land policy by passing general statutes, the Court searched the relevant statutes to determine which party should prevail.[216] In each area, Congress has constitutional authority,

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[212] 256 U.S. 368, 376 (1921).

[213] *Coleman*, 307 U.S. at 452. Today, the Archivist of the United States certifies constitutional amendments under general guidelines provided by Congress. *See* 1 U.S.C. § 106b. In fact, Congress has never engaged in case-by-case certification of constitutional amendments except during Reconstruction. Walter Dellinger, *The Legitimacy of Constitutional Change: Rethinking the Amendment Process*, 97 HARV. L. REV. 386, 400 (1983); Ratification of the Equal Rights Amendment, 44 Op. O.L.C. 1, 32 (2020). The conclusion that courts have a role in ratification disputes has recently been challenged and reaffirmed in the context of debates over the Equal Rights Amendment. Relying largely on Justice Black's concurrence in *Coleman*, litigants have argued that all questions related to ratification of constitutional amendments are political, and therefore the courts have no role in enforcing a ratification time limit adopted by Congress. *See* Virginia v. Ferriero, 525 F. Supp. 3d 36, 50 (D.D.C. 2021). This argument has been rejected by the D.C. District Court, *id.*, just as the same argument was rejected by a three-judge court in 1975 in an opinion by then-Judge John Paul Stevens, Dyer v. Blair, 390 F. Supp. 1291, 1308–09 (N.D. Ill. 1975). The D.C. court reasoned that (1) the concurring justices in the *Coleman* decision had not persuaded a majority of their brethren and (2) the Supreme Court has repeatedly adjudicated disputes over congressionally adopted limitations on the ratification process. 525 F. Supp. 3d at 50 and sources cited. I would add only that even if courts cannot question the validity of the ERA's ratification, it does not follow that they have no role in ratification debates. Congress voted to eliminate the deadline on ERA ratification after the deadline had expired, and the ERA's supporters argue only that Congress's repeal should be respected. Courts might well conclude they cannot tell Congress under what circumstances it can undo what it has done without reaching the additional conclusion that they cannot enforce Congress's rules when Congress has left them in place.

[214] 27 U.S. 253, 307 (1829).

[215] *Id.* at 316–17. This kind of claim-by-claim adjudication is arguably no longer tenable. *See* United States v. Klein, 80 U.S. 128, 146 (1872). *But see* Patchak v. Zinke, 138 S. Ct. 897, 908–09 (2018).

[216] *Foster*, 27 U.S. at 308–09, 315–17. Similarly, in *Williams v. Suffolk Insurance Co.*, the Court held that the question of which nation was sovereign over the Falkland Islands was properly for the executive branch. 38 U.S. 415, 420 (1839). However, the Court did not therefore dismiss the suit. Rather, it held for the plaintiff since the executive branch's determination of sovereignty supported the plaintiff's case. *Id.* at 422. Neither *Foster* nor *Williams* makes clear which constitutional provision gives Congress exclusive authority on questions involving land, but the best candidate is Article IV, Section 3, Clause 2, which provides that "Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States." U.S. CONST. art

but it can exercise that authority by passing a statute and letting the courts interpret and apply that statute.

With this framework in mind, there are two arguments against the claim that judicial nominations cases are political questions because they are committed to a political branch. First, one could argue that the Rules Clause grants only lawmaking authority, and therefore there is no barrier to courts exercising adjudicatory authority by enforcing Senate rules. The Rules Clause—the constitutional provision that provides the most plausible textual commitment to Congress of authority to interpret its own rules—appears on its face[217] to be a straightforward grant of lawmaking authority. After all, it grants each body the authority to "determine its own rules," not to apply or interpret them.

The conclusion that the Rules Clause grants no adjudicatory authority is buttressed by the provision's context. The clause immediately preceding the Rules Clause makes each house of Congress "the Judge of the Elections, Returns, and Qualifications of its own Members,"[218] and the next phrase in the same clause allows each house to "punish its Members."[219] If the Framers wanted Congress to adjudicate rules violations, they could have used similar language. They did not. Nor did they use language analogous to the even clearer phrase by which they granted the Senate "sole Power to try all impeachments."[220]

IV, § 3, cl. 2. This language clearly grants Congress lawmaking authority ("make all needful Rules and Regulations"), but it also provides a more nebulous authority ("to dispose of"). It is this second grant of authority that is best characterized as responsibility-based.

[217] The legislative history of the Rules Clause is sparse, Bruhl, *supra* note 11, at 996, so there is no reason to question the plain meaning of the text.

[218] U.S. CONST. art. I, § 5, cl. 1.

[219] U.S. CONST. art. I, § 5, cl. 2.

[220] U.S. CONST. art. I, § 3, cl. 6 (granting Senate "sole" authority to try impeachments); *see* Nixon v. United States, 506 U.S. 224, 230–33 (1993). While the Court has not taken this approach, it could, without doing too much violence to the case law, take seriously the Framers' choice to use "sole" in the impeachment clauses and nowhere else. In his *Nixon* concurrence, Justice White argued that the word "sole" was used simply to distinguish House and Senate functions, as evidenced by the fact that the word appears only in the two constitutional clauses dealing with impeachment. *Id.* at 241 (White, J. concurring). But the Framers considered using that or similar language to put a variety of other powers in the exclusive control of one institution. At the Philadelphia convention, Charles Pinckney offered draft language that would have given the Senate "sole and exclusive power to declare war; and to make treaties; and to appoint ambassadors and other ministers to foreign nations, and judges of the Supreme Court," as well as "exclusive power to regulate the manner of deciding" disputes between the states. *Journal of the Constitutional Convention*, *in* 5 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION, AS RECOMMENDED BY THE GENERAL CONVENTION AT PHILADELPHIA, IN 1787, at 128–31 (1891). These uses of the word "sole" disappeared because the Senate was not ultimately given those powers. While the history is not conclusive, it does not appear the Framers saved the word "sole" for situations in which the House and Senate each play a distinct role in a

Nor does the Rules Clause appear to grant responsibility-based authority, though this is a closer question. The clearest example of a constitutional provision granting responsibility-based authority is Article IV, Section 4, which gives Congress various tasks, and says nothing about how it should carry them out. Similarly, the constitutional provision at issue in *Foster*, Article IV, Section 3, gives Congress the power to "dispose of" land, without saying how.[221] Finally, Article V, the basis for the *Coleman* Court's decision that ratification of constitutional amendments is up to Congress,[222] does not specify that Congress's role is to provide rules to govern the process. This is a far cry from the Rules Clause's specific grant of authority to make "rules." If the Framers had intended to grant Congress responsibility-based authority, they could have empowered each chamber to "maintain order" or used some other general, outcome-based language. It would make little sense to specify that Congress's job is simply to write rules. If this is accepted, the courts should treat the Rules Clause like other grants of lawmaking authority, and acknowledge that once Congress has made law, it is emphatically the province and duty of the judicial branch to apply that law where it is relevant.[223]

A second argument would claim either that the Rules Clause is a grant of responsibility-based authority, or, more plausibly, that the Senate's "advice and consent" power, combined with the necessary and proper clause, is a responsibility-based authority to confirm nominees, and to address any disputes that arise in the process.[224] If the Senate has responsibility-based authority, it has "discretion in the choice of means" for resolving disputes related to nominations. The Senate can choose to regulate the nominations process by adopting general rules and delegating adjudication under those rules to the courts.

2. Judicially Discoverable and Manageable Standards

When courts determine whether they have "judicially discoverable and manageable standards" for answering a question, under *Baker*'s second prong, they are careful to be specific about what question must be answered. While the *Zivotofsky* Court may have lacked judicially administrable standards for determining whether individuals born in Jerusalem should be able to have "Israel" listed as their birthplace on their passports, it had clear standards for determining whether Congress or the

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common enterprise. The Pinckney proposal, which contains much of the language ultimately included in the Constitution, suggests that when the Framers intended to provide exclusive power, they said so.

[221] *See supra* note 216 and accompanying text.

[222] 307 U.S. at 454.

[223] This reading of the Rules Clause might appear to preclude the adjudication of rules disputes that the House and Senate engage in today. However, it could be argued that while the Senate has no adjudicatory authority, it can settle internal disputes without relying on the courts, just as any group of individuals can, without any need of formal authority. This would not suggest that *only* the Senate can adjudicate its disputes.

[224] *Cf.* Bruhl, *supra* note 11, at 980–83.

president should answer that question.[225] While the *Luther* Court lacked "criteria by which a court could determine which form of government was republican,"[226] once Congress provided those criteria, it did not hesitate to interpret them and rule accordingly.[227] And while the Court in *Rucho v. Common Cause* could find no standards to identify an impermissible partisan gerrymander,[228] it made clear that should Congress provide those standards, it would apply them.[229]

Courts face an analogous situation when adjudicating cases involving executive branch rules. Under the Administrative Procedure Act, some administrative actions are not judicially reviewable because they are "committed to agency discretion by law."[230] However, when an agency promulgates regulations that give courts a legal rule to apply, otherwise unreviewable actions may be rendered reviewable.[231] Similarly, when the Senate provides judicially administrable rules, the courts should apply them.

If the Supreme Court has limited the political question inquiry to *Baker*'s first two prongs, there is no need to go further. However, *Zivotofsky* did not expressly eliminate the rest of the *Baker* test. At least two current justices believe that the other *Baker* factors are still relevant,[232] and the Ninth Circuit has invoked the political question doctrine relying entirely on factors other than the first two.[233] Therefore, I will address the other *Baker* factors.

3. The Remaining *Baker* Factors

The remaining *Baker* factor most relevant to a congressional rules case asks whether judicial inquiry into the inner workings of Congress "express[es] a lack of

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[225] Zivotofsky v. Clinton, 566 U.S. 189, 197–98 (2012). Commentary on *Zivotofsky* has split between advocates of a broad rule by which there is "no such thing as a political question of statutory interpretation," Michel, *supra* note 185, at 254; El-Shifa Pharm. Indus. Co. v. United States, 607 F.3d 836, 855 (D.C. Cir. 2019) (Kavanaugh, J., concurring), and defenders of a narrower rule that would find statutory interpretation questions nonjusticiable when "manageable standards are lacking or where judicial involvement would be particularly risky," *The Supreme Court 2011 Term—Leading Cases*, 126 HARV. L. REV. 307, 311 (2012). Even on the narrower reading, a clear congressional rule would be judicially cognizable, and prudential considerations militate in favor of adjudication when Congress wishes to bind itself. *See supra* Part II.

[226] Baker v. Carr, 369 U.S. 186, 222 (1962).

[227] Texas v. White, 74 U.S. 700, 732 (1869).

[228] Rucho v. Common Cause, 139 S. Ct. 2484, 2507 (2019).

[229] *Id.* at 2508.

[230] 5 U.S.C. § 701(a); *see* Heckler v. Chaney, 470 U.S. 821, 830 (1984).

[231] *See, e.g.*, Lopez v. Fed. Aviation Admin., 318 F.3d 242, 247–48 (D.C. Cir. 2003). *See also* Merrill, *supra* note 113, at 591, 605 and cases cited at 591 n.155.

[232] *See* Zivotofsky v. Clinton, 566 U.S. 189, 202–07 (2012) (Sotomayor, J., concurring) (joined by Justice Breyer).

[233] Saldana v. Occidental Petroleum Corp., 774 F.3d 544, 551–52 (9th Cir. 2014).

the respect due coordinate branches of government."[234] The Court derived this factor from *Field*,[235] and I have already discussed why neither that case nor the general principle of respect for a coequal branch precludes judicial enforcement of Senate nominations rules.[236]

The other *Baker* factors can be disposed of quickly. A congressional rules dispute does not present that "rare case"[237] where the remaining *Baker* factors apply. It presents no "unusual need for unquestioning adherence to a political decision already made,"[238] such as when the executive branch has called out the militia to quell a disturbance.[239] Nor does a congressional rules dispute present "the potentiality of embarrassment from multifarious pronouncements by various departments on one question"[240] of the type that would "risk embarrassment of our government abroad, or grave disturbance at home."[241] Finally, a rules dispute is not "impossib[le to decide] without an initial policy determination of a kind clearly for nonjudicial discretion."[242] Cases implicating this prong involve plaintiffs demanding that courts legislate.[243] A rules dispute requires only that they do what courts do every day, interpret and apply the "initial policy determination" made by lawmakers.[244]

Only one circuit court opinion since *Zivotofsky* has relied on the third through sixth *Baker* factors, and it involved starkly different facts than are presented by a nominations rule dispute. In *Saldana v. Occidental Petroleum Corporation*, plaintiffs asked for a finding that the defendant had funded a Colombian paramilitary organization so brazenly murderous that any funder must have known it was subsidizing human rights abuses.[245] The problem, in the Court's eyes, was that the U.S. Government's payments to the same group made the Defendant's look small by comparison,[246] and the executive branch had not only funded the paramilitaries, but certified that this did not pose a threat to human rights.[247] The Ninth Circuit held, relying on the fourth, fifth and sixth *Baker* factors, that it could not create a situation in which one branch of the federal government considered the paramilitaries allies

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[234] Baker v. Carr, 369 U.S. 186, 217 (1962).

[235] *Id.* at 214.

[236] *See supra* notes 159–71 and accompanying text.

[237] *Zivotofsky*, 566 U.S. at 205 (Sotomayor, J., concurring).

[238] *Baker*, 369 U.S. at 217.

[239] Luther v. Borden, 48 U.S. 1, 49 (1849).

[240] *Baker*, 369 U.S. at 217.

[241] *Id.* at 226.

[242] *Id.* at 217.

[243] *See* Schroder v. Bush, 263 F.3d 1169, 1172 (10th Cir. 2001); Ad Hoc Comm. on Jud. Admin. v. Massachusetts, 488 F.2d 1241, 1243 (1st Cir. 1973).

[244] *Baker*, 369 U.S. at 217.

[245] Saldana v. Occidental Petroleum Corp., 774 F.3d 544, 545 (9th Cir. 2014).

[246] The defendant had provided $6.3 million to the paramilitary group; the U.S. Government, $99 million. *Id.* at 547–48.

[247] *Id.* at 549.

and another branded them international criminals.[248] Whatever one thinks of the Court's unwillingness to confront the State Department, it seems clear that the embarrassment at stake in *Saldana* is qualitatively different than the embarrassment that results when a court and the current Senate majority disagree on how to interpret a Senate rule that a previous Senate majority had committed to judicial interpretation.

The political question doctrine is legendarily confusing and convoluted,[249] and it is always possible that courts would apply its nebulous principles to block consideration of a nominations rule case. However, the Supreme Court has not come close to doing so yet, and nothing in the cases decided under the political question doctrine provides a reason to expand the doctrine in such a way. Moreover, the Court has made clear that outcomes matter. "The political question doctrine, a tool for maintenance of governmental order," the Court said in *Baker*, "will not be so applied as to promote only disorder."[250] If the judicial enforcement of Senate rules allows for a more orderly staffing of the judicial branch, the political question doctrine is fully consistent with courts playing that role.

D. The Accardi Doctrine

We have one final doctrine to consider,[251] and this one provides fairly straightforward support for the argument advanced here. While courts are rarely called upon to determine whether Congress is bound by a congressional rule, they frequently

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[248] *Id.* at 554–55.

[249] *See* Zachary Baron Shemtob, *The Political Question Doctrines:* Zivotofsky v. Clinton *and Getting Beyond the Textual-Prudential Paradigm*, 104 GEO. L.J. 1001, 1002 (2015); Henkin, *supra* note 160, at 597.

[250] *Baker*, 369 U.S. at 215.

[251] Two other barriers to judicial consideration deserve a brief mention: the D.C. Circuit's doctrine of equitable discretion and the Speech or Debate Clause. The doctrine of equitable discretion could theoretically also preclude judicial enforcement of congressional rules. *See* Riegle v. Fed. Open Mkt. Comm., 656 F.2d 873, 881 (D.C. Cir. 1981). However, the doctrine has generally operated more like a standing doctrine, blocking particular litigants but not particular claims. *See* Gregg v. Barrett, 771 F.2d 539, 546 (D.C. Cir. 1985). Regardless, it is reasonably clear at this point that the D.C. Circuit has given up on the doctrine. Comm. on Judic. v. McGahn, 951 F.3d 510, 528 (D.C. Cir. 2020).

A district court has avoided judicial scrutiny of legislative decisions based in part on the Speech or Debate Clause, Vander Jagt v. O'Neill, 524 F. Supp. 519, 521 (D.D.C. 1981), but the reviewing circuit court declined to rely on that provision, noting that "[b]oth the history and the Supreme Court's interpretation of the Clause indicate that it should be used to shield actions of individual legislators or their staffs who otherwise might fear civil or criminal attacks." Vander Jagt v. O'Neill, 699 F.2d 1166, 1171–72 (1982). The Clause has played no role in other similar cases. *Cf. Gregg*, 771 F.2d at 542–43 (declining to apply the Speech or Debate Clause to a suit challenging Congress's practices with respect to the congressional record). In any event, the district court's ruling relied explicitly on the fact that plaintiffs were challenging actions taken pursuant to a House rule. *Vander Jagt*, 524 F. Supp. at 521. Had the Court determined that such actions were in violation of House rules, the outcome might well have been different.

face an analogous question: whether an executive branch agency is bound by a rule that it promulgated. The framework courts use in this situation was applied in *Yellin*,[252] and it arguably provides the best fit for a nominations rule case, which similarly asks whether courts can enforce rules that a political branch promulgates for itself. The doctrine that courts use to answer this question has come to be known as the Accardi Doctrine.[253]

The Accardi Doctrine has been incompletely theorized and inconsistently applied.[254] However, some elements are clear. Most obvious and most relevant for present purposes, courts frequently treat rules, including procedural rules,[255] as binding upon the agencies that promulgated them.[256] The situations in which courts do so vary, but Professor Thomas W. Merrill has provided a helpful restatement. According to Merrill, courts enforce "legislative rules," which can be identified through a two-step process. "First, we must determine whether Congress has delegated authority to the agency to make legislative rules. Second, we must ascertain whether the agency intends to invoke this authority in making a rule."[257]

The first requirement is easily met in a Senate rules case. Congress—far more than the executive branch[258]—has clear-cut authority to legislate, and the Rules Clause specifically authorizes Congress to adopt internal rules.[259] Accardi would seem to apply whenever the Senate indicates its intent to invoke its rulemaking authority. While agencies are less accountable to the public than Congress, and therefore may receive less deference from the courts, the Accardi Doctrine can also bind

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[252] Yellin v. United States, 374 U.S. 109, 120–21 (1963).

[253] *See generally* Merrill, *supra* note 113. The belief that courts are the right institution to resolve these kinds of intragovernmental choice of law problems, at least in some circumstances, goes back to the Federalist Papers. *See generally* THE FEDERALIST NO. 78 (Alexander Hamilton).

[254] *See* Merrill, *supra* note 113, at 569.

[255] *Id.* at 589 (concluding roughly three-fourths of D.C. Circuit decisions employing the Accardi Doctrine involved procedural rules).

[256] *Id.* at 569. Merrill treats this attribute of the Accardi Doctrine as essentially self-evident. *Id.*

[257] *Id.* at 599. Merrill distills this description from the general judicial approach to the Accardi Doctrine, but he notes that it is directly stated in both *United States v. Mead Corp.*, 522 U.S. 218, 226–27 (2000), and *American Postal Workers Union v. United States Postal Service*, 707 F.2d 548, 558 (D.C. Cir. 1983). Merrill, *supra* note 113, at 599 n.207; *see also* Ariz. Grocery Co. v. Atchison, Topeka & S.F. Ry. Co., 284 U.S. 370, 389 (1932); cases cited at Merrill, *supra* note 113, at 596 n.194.

[258] For some, the idea of the executive promulgating legislative rules is a contradiction in terms. *See, e.g.*, Eric A. Posner & Adrian Vermeule, *Interring the Nondelegation Doctrine*, 69 U. CHI. L. REV. 1721, 1723 (2002); Merrill, *supra* note 113, at 573, 600.

[259] Bruhl looks to the Senate's power to consider nominations, combined with the necessary and proper clause, as an independent grant of authority to adopt rules governing the consideration of nominees. Bruhl, *supra* note 11, at 980–83.

the president when he acts contrary to a valid regulation.[260] The Court should do as it did in *Yellin* and apply the doctrine to Congress just as it does to the executive.

E. Conclusion

This Part has shown that the Supreme Court has repeatedly upheld judicial application of congressional rules in *Smith* and its progeny. While the *Field* line of cases appears to counsel reticence in applying congressional rules, those cases can be distinguished on several grounds in a manner that is both consistent with the case law and theoretically satisfying. Further, if the courts were to ignore the cases that deal directly with congressional rules and apply general doctrinal principles as they stand today, it should reach two conclusions: (1) the political question doctrine provides no reason not to adjudicate a congressional rules dispute, and (2) the Accardi Doctrine provides a compelling rationale for enforcing congressional rules when Congress has indicated it wants that outcome. I now ask whether judicial enforcement of nominations rules is consistent with constitutional principle.

III. JUDICIAL ENFORCEMENT IS CONSISTENT WITH CONSTITUTIONAL PRINCIPLE

While the case law regarding judicial enforcement of nominations rules suggests that they are judicially cognizable, that does not conclude my argument. The case law directly on point fails to articulate a clear rationale for judicial action in this area, and the opinion that speaks most clearly to the question (*Smith*) was handed down before courts developed most of the modern doctrine that currently governs federal court jurisdiction.[261] If a court were to consider a nominations rule case today, it might refer to first principles as much as precedent. Fortunately, principle as well as precedent supports judicial enforcement of nominations rules.

My argument in this Part consists of a simple claim: judicial enforcement of Senate nominations rules facilitates majoritarianism and the positive governmental outcomes facilitated by majoritarianism. Considering judicial enforcement in terms of majoritarianism provides a hard test for my argument. Concerns about counter-majoritarianism are usually discussed as a reason—perhaps the key reason—to be

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[260] *See* United States v. Nixon, 418 U.S. 683, 695–96 (1974).

[261] It could be argued that the two cases applying *Smith* reflect their unusual context. Both *Christoffel* and *Yellin* involved attempts by Congress to investigate activity protected by the First Amendment. The Court may have felt that interpreting and applying congressional rules was a pragmatic means of limiting congressional overreach without expressly holding that Congress has no power of inquiry whenever such inquiry may chill free speech. *Cf.* ALEXANDER BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 163 (arguing that holding congressional committees to the limits established by their parent bodies limits Congress's exercise of its "visitorial power to invade privacy almost at will" without the need for "a full set of principled rules for congressional investigations").

skeptical of judicial action.[262] Indeed, if the various doctrines limiting federal court jurisdiction have a single philosophical source, it is the courts' concerns about democratic legitimacy. The Supreme Court has attributed "[t]he several doctrines that have grown up to elaborate" the Constitution's limitations on federal court jurisdiction to "concern about the proper—and properly limited—role of the courts in a democratic society."[263] If majoritarianism counsels in favor of judicial action in this sphere, that provides a powerful argument for such action.

Of course, the Constitution is full of institutional arrangements designed to thwart popular rule.[264] If counter-majoritarianism is a difficulty, it is not always

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[262] *See, e.g.*, BICKEL, *supra* note 261, at 16–23; JESSE CHOPER, JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS: A FUNCTIONAL RECONSIDERATION OF THE ROLE OF THE SUPREME COURT 24 (1980); JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 20 (1980). In his three-article intellectual history of the "countermajoritarian difficulty," Barry Friedman argues persuasively that "[t]he apparent tension between judicial review and the democratic process—what Alexander Bickel dubbed the 'countermajoritarian difficulty'—has been the focal point of modern constitutional scholarship." Barry Friedman, *The History of the Countermajoritarian Difficulty, Part One: The Road to Judicial Supremacy*, 73 N.Y.U. L. REV. 333, 334 (1998); *see also* Barry Friedman, *The History of the Countermajoritarian Difficulty, Part II: Reconstruction's Political Court*, 91 GEO. L.J. 1 (2002) [hereinafter Friedman, *Reconstruction's Political Court*]; Barry Friedman, *The History of the Countermajoritarian Difficulty, Part Three: The Lesson of* Lochner, 76 N.Y.U. L. REV. 1383 (2001); Barry Friedman, *History of the Countermajoritarian Difficulty Part Four: Law's Politics*, 148 U. PA. L. REV. 971 (2000); Barry Friedman, *The Birth of an Academic Obsession: The History of the Countermajoritarian Difficulty, Part Five*, 112 YALE L.J. 153 (2002).

[263] Allen v. Wright, 468 U.S. 737, 750 (1984) (internal citations and quotations omitted). For a more eloquent articulation, see Vander Jagt v. O'Neill, 699 F.2d 1166, 1178–79 (1982) (Bork, J., concurring). Notably, while Bickel's concern with counter-majoritarianism was specifically limited to judicial review of legislation based on the constitution, see BICKEL, *supra* note 261, at 16–23, the jurisdictional doctrines referenced by the courts and theorized by Bickel are frequently employed in cases that do not involve such review. *See, e.g.*, TransUnion LLC v. Ramirez, 141 S. Ct. 2190, 2203 (2021) (involving state law consumer protection suit); Summers v. Earth Island Inst., 555 U.S. 488, 492–93 (2009) (involving statutory challenge to U.S. Forest Service regulations); *Allen*, 468 U.S. at 740 (involving challenge to IRS's failure to enforce anti-discrimination statutes). The Supreme Court has not articulated the relationship between limitations on judicial power to adjudicate statutory cases and democratic values, but both Chief Justice Roberts and former Justice Scalia provided separate theories on the topic before they reached the Court. Scalia, *supra* note 154, at 894 ("[T]he law of standing roughly restricts courts to their traditional undemocratic role of protecting individuals and minorities against impositions of the majority, and excludes them from the even more undemocratic role of prescribing how the other two branches should function in order to serve the interest of *the majority itself*."); John G. Roberts, Jr., *Article III Limits on Statutory Standing*, 42 DUKE L.J. 1219, 1230 (1993) (standing doctrine "ensures that the court is carrying out its function of deciding a case or controversy, rather than fulfilling the executive's responsibility of taking care that the laws be faithfully executed"). The Court itself has since relied on those theories. *See Transunion*, 141 S. Ct. at 2203.

[264] *See* Erwin Chemerinsky, *The Supreme Court 1988 Term—Foreword: The Vanishing*

deadly in our political system. My argument is not, therefore, simply that judicial enforcement of Senate rules facilitates majoritarianism, but that it helps to achieve goals that the Framers valued and that they hoped the majoritarian elements of the Constitution would serve. Specifically, judicial action of this sort helps to keep officials accountable to the people they serve, and to take advantage of the unique competence that elected leaders bring to the problem of governance.

A. Counter-Majoritarian Judicial Inaction and Majoritarian Judicial Action

When courts or commentators discuss counter-majoritarianism, they are almost invariably referring to policy considerations that counsel against judicial action.[265] But there is no reason this should always be so. Courts can undermine majoritarianism through inaction, as well as through action. If the federal courts were to decline jurisdiction over all criminal cases, this jurisdictional ruling would have the same effect as a merits ruling declaring criminal punishment unconstitutional. The merits ruling would be easily recognized as counter-majoritarian. The jurisdictional ruling should be as well.

A few prominent examples show how the line between judicial humility and judicial presumption can be thin and arbitrary. In *Marbury v. Madison*, Chief Justice Marshall determined that the plaintiff had a right to his commission as a justice of the peace for Washington, D.C.,[266] and that he was entitled to a writ of mandamus to secure that commission.[267] However, Marshall then concluded that, while Congress had granted the Court original jurisdiction in cases like the one at bar, such jurisdiction was inconsistent with Article III of the U.S. Constitution.[268]

The decision in *Marbury* is almost universally seen as an act of judicial assertion, but it could just as easily be described as an act of deference to the people's representatives. After all, Chief Justice Marshall denied his own ability to intervene in a dispute (despite Congress's apparent invitation to do so[269]), and in doing so sided

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Constitution, 103 HARV. L. REV. 43, 74–75 (1989); Barry Friedman, *Dialogue and Judicial Review*, 91 MICH. L REV. 577, 617–20 (1993); Roberts & Chemerinsky, *supra* note 57, at 1798–99; CHOPER, *supra* note 262, at 36.

[265] *See supra* notes 262–63 and accompanying text.

[266] 5 U.S. 137, 162 (1803).

[267] *Id.* at 173.

[268] *Id.* at 175.

[269] William W. Van Alstyne has argued that the relevant statutory provision can be read not to provide the Supreme Court with original jurisdiction in *Marbury*, a reading that would have allowed Marshall to avoid the constitutional question. William W. Van Alstyne, *A Critical Guide to* Marbury v. Madison, 1969 DUKE L.J. 1, 14–16 (1969). However, even Van Alstyne does not claim that the statute could not be read as Marshall read it. Whether Marshall chose to reject a clearly stated or an unclearly stated grant of authority, he declined to exercise judicial authority when he could have done so.

with the recently elected Jefferson Administration over the Federalists who had just been repudiated by the American voters. While he asserted judicial authority to invalidate actions taken by the political branches, Marshall would have had to do that regardless.[270] The Jefferson Administration's actions were inconsistent with those of the Adams Administration; one or the other had to be rejected. What makes Marshall's decision notable, one could argue, is not that he claimed power for the judiciary, but that he chose not to use judicial power granted to the Court by Congress.

Or take a more directly impactful example. In *Dred Scott v. Sandford*, citing the "peculiar and limited jurisdiction of courts of the United States,"[271] the Supreme Court declined jurisdiction to hear a Black man's suit for his freedom, holding that descendants of enslaved Africans could not possibly be among the "citizens" granted access to the courts by the Constitution.[272] By ostensibly removing the Court from the controversy, the justices committed a great moral wrong, and they set the nation on a path to civil war. But in form, *Dred Scott*'s first holding[273] was another judicial rejection of congressional authority to act.[274]

Why are *Marbury* and *Dred Scott* not seen as humble displays of the judiciary's passive virtues? Because history has focused on what those opinions did, not what they said. While they used the language of judicial modesty, those opinions had a deeply immodest impact.[275] Fealty to majoritarianism requires consideration of the real-world impact of the judiciary's refusal to act.

Viewed in terms of results, not rhetoric, a judicial decision to enforce nominations rules is majoritarian in two ways. First, it gives the Senate options that it would not otherwise have, without taking options away. When the Senate is effectively caught in a prisoner's dilemma—unable to adopt a particular rule because it is uncertain whether the rule will meet with compliance from both parties—judicial enforcement allows the Senate to adopt a rule that would have been off the table in the absence of such enforcement. When the Senate does not face a prisoner's dilemma, it can simply choose

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[270] *See Marbury*, 5 U.S. at 1–3.

[271] 60 U.S. (19 How.) 393, 401 (1857) (enslaved party), *superseded by constitutional amendment*, U.S. CONST. amend. XIV.

[272] *Id.* at 406. The relevant Constitutional text is in Article III, Section 2, Clause 1: "The judicial power shall extend to all cases . . . between citizens of different states."

[273] The Court's other holding—invalidating the Missouri Compromise, 60 U.S. at 452—goes beyond declining jurisdiction and is not plausibly characterized as an act of judicial modesty.

[274] Justice Grier, concurring in the judgment, wrote separately to point out that there was no practical difference between a ruling against Scott on the merits and a jurisdictional ruling. *Id.* at 469.

[275] This effect also plays out in less momentous cases, when the Court claims not to strike down any action of the political branches. For example, as then-Judge Kavanaugh has pointed out, when courts reject statutory claims under the political question doctrine, they undermine congressional power relative to the executive branch, just as if they had ruled in favor of broad executive power. *See* El-Shifa Pharm. Indus. Co. v. United States, 607 F.3d 836, 857 (D.C. Cir. 2019) (Kavanaugh, J., concurring).

not to invite judicial enforcement of its rules. By giving an elected institution greater flexibility to achieve the people's goals, judicial enforcement enhances democracy.

Judicial enforcement is also majoritarian in that it allows the Senate to decide whether the rules it hopes to adopt should be judicially enforced. In practice, this analysis is likely to involve a balancing of equities. Senators will worry about judicial action that either misinterprets the Senate's intent or proves unduly meddlesome. In some cases, however, they will consider that risk a price worth paying. For example, if senators become convinced that tit-for-tat partisan sniping has made it impossible to efficiently staff the judicial branch, they may prefer enforceable rules that end the sniping, even at the risk of judicial mistakes or meddling. If judicial enforcement is available, that is a decision for the Senate to make.

By contrast, judicial enforcement has a minimal counter-majoritarian impact, relative to other judicial acts. In explaining the discomfort Americans feel about the institution of judicial review, Alexander Bickel argued that democracy "mean[s] that a representative majority has the power to accomplish a reversal" of policy judgments with which it disagrees.[276] Bickel distinguished judicial constitutional lawmaking, on the one hand, from judicial articulation of the common law, on the other.[277] While in both cases unelected judges determine policy, only the former raises concerns about democratic legitimacy, because only the former allows for decisions which a legislative majority is "powerless to affect."[278] Democracy is not just about who makes decisions, but about who can unmake them.

Bickel's point is that, unlike judicial review, common lawmaking does not take power from Congress. Without judicial review, Congress could adopt any policy using its normal procedure. With judicial review, Congress must use Article V's more onerous process to enact policies the courts have rejected. Common lawmaking has no such effect. With it or without it, Congress can adopt any policy using its normal procedure.

Judicial enforcement of Senate rules resembles common lawmaking, not judicial review. Courts enforcing Senate rules can only declare default rules. The Senate can "accomplish a reversal" of these rules even more easily than Congress can "accomplish a reversal" of the common law rules Bickel finds so benign.[279] In fact, it is

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[276] BICKEL, *supra* note 261, at 17. *See also* ELY, *supra* note 262, at 7.

[277] BICKEL, *supra* note 261, at 20.

[278] *Id.* Of course, Bickel glosses over two key facts. The public is not "powerless to affect" constitutional decisions. It can adopt a constitutional amendment. Nor can "a legislative majority" overturn the common law. That requires a concurrent majority in the House and supermajority in the Senate, along with the assent of the president. This makes a big difference. *See generally* Matias Iaryczower, Gabriel Katz & Sebastian Saiegh, *The Not-So-Popular Branch: Bicameralism as a Counter-Majoritarian Device* (2009). Nonetheless, Bickel's basic point stands. Some judicial decisions are so difficult to overturn that they are best understood as taking decision making away from the people, while others are easier to overturn and therefore less problematic. *See also* CHOPER, *supra* note 262, at 169–70.

[279] BICKEL, *supra* note 261, at 17.

easier for the Senate to overturn a judicial interpretation of its rules than it is for the Senate to take almost any other action. Every other action the Senate takes requires it to coordinate with some other entity, either the president or both the president and the House of Representatives. But it can overturn a judicial interpretation of its rules without asking anybody's permission, and using whatever procedures it has set for itself. By contrast, if the courts were to decide they have no power to enforce Senate rules, even when the Senate authorizes judicial action, the Senate could reverse that decision only by winning the support of other institutional actors for a constitutional amendment. A ruling against judicial enforcement thus ties the Senate's hands far more effectively than a ruling for it.

As discussed above, it is not sufficient to show that judicial enforcement of nominations rules is majoritarian. Our constitutional system contains numerous countermajoritarian features, and it would be difficult to argue that pure majoritarianism is a constitutional principle.[280] However, two concepts closely related to majoritarianism *are* deeply embedded in our Constitution and the foundations of our democratic republic, and both counsel in favor of judicial enforcement of the type I propose. These principles are democratic accountability and institutional competence.[281]

1. Holding Senators Accountable

If the Framers rejected plebiscitary democracy and drafted a constitution that frequently departed from majoritarianism, they more consistently sought to build a system of democratic accountability, or, as the Framers often wrote, a government "dependent on" the people.[282] Unlike the Anti-Federalists, who emphasized a direct identity between the interests of the governors and of the governed, those who drafted the new constitution recognized that elected leaders would be a class apart and sought to ensure that they could be kept in line by the frequent threat of losing their offices.[283]

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[280] Some commentators have attempted to make the case that majoritarianism *is* a bedrock constitutional principle. *See, e.g.*, CHOPER, *supra* note 262, at 4 ("[In] this nation's constitutional development from its origin to the present time, majority rule has been considered the keystone of a democratic political system in both theory and practice."). I do not mean to argue otherwise. However, since a constitutional requirement of majoritarianism is, at the least, contested, I want to show that judicial enforcement facilitates goals that are more clearly inherent in our constitutional system.

[281] This framework is suggested by Jeremy Waldron's distinction between "process-based" and "outcome-based" arguments for judicial review. *See* Jeremy Waldron, *The Core of the Case Against Judicial Review*, 115 YALE L.J. 1346, 1372 (2006).

[282] *See* THE FEDERALIST NO. 35 (Alexander Hamilton); THE FEDERALIST NOS. 37, 39, 51, 57 (James Madison).

[283] Michael P. Zuckert, *The Virtuous Polity, the Accountable Polity: Liberty and Responsibility*, *in* The Federalist, 22 PUBLIUS 123, 130–34 (1992); ELY, *supra* note 262, at 89–90.

Political scientist R. Douglas Arnold has provided a helpful framework for thinking about democratic accountability.[284] Voters, according to Arnold, can use a Party Performance rule, under which they consider how they feel the country is doing and which party controls the government, and then they reward or punish the governing party.[285] Arnold argues persuasively that this approach "requires the least information and analysis on the part of the citizens and demands the most performance on the part of legislators."[286]

The prisoner's dilemma logic of the nominations process puts a spoke in the wheel of the party performance rule. In recent history, neither party can claim a sterling record on confirming nominees when the president is of the other party,[287] and neither may be able to develop such a record without allowing the less-responsible party to dictate the composition of the federal bench. In this context, voters cannot hold the political parties accountable for a key constitutional function, maintaining an effective third branch of government. They do not have, and are unlikely to get, the option of voting for a party that does this job well.

Worse, the forces that undermine voluntary compliance with Senate rules make it possible for one party to blame the other for its own norms violations. The majority can tell voters that it violated cherished norms only because the minority party would have done the same in similar circumstances.[288] The majority's claims then become a self-fulfilling prophecy when the minority pays the majority back in kind. If they see gridlock in the judicial nominations process and want to throw the bums out, voters cannot be sure which bums to toss.[289]

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[284] *See generally* R. DOUGLAS ARNOLD, THE LOGIC OF CONGRESSIONAL ACTION (1990).

[285] *Id.* at 41–44.

[286] *Id.* at 42–43. The party performance rule is not without its problems. Citizens may not know which party controls the federal government, *id.* at 41–42, 42 n.12, or they may erroneously blame the party in power for failures caused by the other party's obstruction. *See generally* FRANCES E. LEE, INSECURE MAJORITIES: CONGRESS AND THE PERPETUAL CAMPAIGN ch. 3 (2016). However, these problems pose less of a threat in the context of judicial nominations, where the president and the Senate each have separate and identifiable roles, the House cannot block Senate action, and in recent years the minority party has lost the filibuster and other tools of obstruction.

[287] *See generally* ILYA SHAPIRO, SUPREME DISORDER: JUDICIAL NOMINATIONS AND THE POLITICS OF AMERICA'S HIGHEST COURT (2020); Gerhardt & Painter, *supra* note 6, at 270–75.

[288] *See supra* notes 1–5 and accompanying text.

[289] Still, the other forms of electoral accountability discussed by Arnold—accountability based on incumbent performance, party positions, or candidates' positions—fare worse. ARNOLD, *supra* note 284, at 44–57. Because party leaders can block judicial nominees without rank-and-file senators taking a vote, most voters cannot simply look at their senator's voting record and hold that senator accountable for Washington gridlock. *See supra* Part I; *see also* ARNOLD, *supra* note 284, at 47–48. Further, both individuals and parties can take vague positions opposing partisan obstruction but refusing to end it unilaterally and therefore

Judicial enforcement of nominations rules helps to address this problem. Today, when a Senate majority leader or Judiciary Committee chair does not consider a nominee or set of nominees, that omission is subtle and individualized. It is subtle because nobody must announce that the nominees are not being considered. They just do not show up on the committee docket or the Senate floor. The public—if anybody is paying attention to the nominees in question—may assume the issue is scheduling or some process problem, or that the nominee will soon receive consideration. Only those who are tracking the overall performance of the system are likely to notice that the majority is blocking nominees. And even then, it may be unclear why this is so.

The omission is individualized because if anybody asks about a blocked nominee the majority need not own up to a general policy of obstruction. It can point to idiosyncrasies in the backgrounds of particular nominees or alleged administration process fouls. The public is likely to be treated to a confusing debate over a particular nominee's history or the details of Senate scheduling practices, a debate that will rarely clarify whether and why the Senate is abdicating its constitutional responsibility.

In theory, the majority could address this situation by proposing a rule like the one discussed above, even if the rule could not be judicially enforced. But so long as the rule is seen as merely hortatory,[290] the majority has no incentive to propose it and observers are unlikely to take it seriously. By making a Senate confirmations rule like the one proposed above a real possibility, judicial enforcement allows voters to hold their senators accountable for supporting or opposing such a rule.

More importantly, if courts provide poor outcomes—such as substantial delays in resolving claims—voters face one less impediment to holding their elected leaders accountable for the harm this causes. By making the Senate governable, Senate nominations rules make it easier to blame leadership if the body is not, in fact, governed.[291]

Further, allowing judges to interpret and apply congressional rules does not undermine political accountability the way judicial review arguably does. Since elected officials can easily overturn any judicial decision by amending their rule, they decide how Senate rules will look at the end of the day. Voters can hold them accountable for the results.

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cede the federal bench to their political opponents. If voters prefer an inefficiently staffed judicial branch to one consistently out of step with their views, they will accept this position from their leaders, and the result will be more gridlock.

[290] As discussed above, this will not always be the case. Depending on the state of Senate comity and the rule in question, a non-judicially enforceable rule may be expected to receive voluntary compliance. My argument is not that judicial enforcement is always necessary, only that it should be available when the Senate feels it is needed.

[291] This notion that the potential for governmental effectiveness is an important part of enabling voters to hold their elected officials accountable has arguably been part of America's constitutional calculus from the beginning. *See* THE FEDERALIST NO. 63 (James Madison) ("Responsibility, in order to be reasonable, must be limited to objects within the power of the responsible party."); Zuckert, *supra* note 283, at 132; Paul Peterson, *The Meaning of Republicanism*, *in* The Federalist, 9 PUBLIUS 43, 49–50 (1979).

2. Institutional Competence

The most obvious argument for the courts' institutional competence to enforce Senate rules is that it puts them in a role they frequently play: interpreting and applying rules written by a legislative body.[292] In fact, the judiciary may have an even greater comparative advantage in adjudicating Senate rules cases than it has when adjudicating other suits. When the Senate interprets Senate rules, it is serving as a judge in its own case. The same Senate majority whose leader is trying to block consideration of a nominee is called upon to determine whether that leader acted unlawfully. The courts have no such direct conflict of interest.[293]

Furthermore, under my argument, the Senate determines whether a particular Senate rule should be enforced by the courts. This decision involves a determination of whether senators will voluntarily comply with a given rule. It involves predictions about how courts will interpret such rules and judgments about how to craft rules designed to constrain courts, where appropriate, and provide flexibility, where desired. And it involves striking a balance between the benefit of ensuring compliance and the risk of undue judicial meddling. These acts of political and legislative prediction, drafting, and balancing are right in the wheelhouse of a legislative body.

It has been argued that courts should not get involved in internal congressional deliberations because only lawmakers could possibly understand what happens in the legislative branch. As then-Judge Bork put it, quoting Alexander Bickel:

> The institutions of a secular, democratic government do not generally advertise themselves as mysteries. But they are. What

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[292] United States v. Morrison, 529 U.S. 598, 628 (2000) (Souter, J., dissenting); CHOPER, *supra* note 262, at 68. *See generally* Christopher Eisgruber, *The Most Competent Branches: A Response to Professor Paulsen*, 83 GEO. L.J. 347 (1994). Scholars have argued that courts are not quite as good at interpreting written bills of rights as is sometimes assumed, see Waldron, *supra* note 281, at 1379–86, but I have not seen a similar argument that they are ill-suited to statutory interpretation.

[293] The Framers had a similar conflict of interest in mind when they crafted an independent judiciary. As Alexander Hamilton wrote in *The Federalist No. 78*, it "cannot be the natural presumption" that "the legislative body are themselves the constitutional judges of their own powers." If anything, the Senate majority's conflict of interest in enforcing Senate rules is starker than the conflict that worried Hamilton. Constitutional decision making requires lawmakers to renounce some of their power in favor of principles that have inspired passionate adherence throughout U.S. history. In practice, this happens all the time. Some members of Congress have built a career denying congressional power. *See 'The Move Away from Federalism and Separation of Powers Has Had Lasting Impacts on American Democracy': Harvard Law School*, HARV. L. TODAY, Dec. 3, 2019. Nominations rules cases require lawmakers to denounce their leadership in favor of rules that are likely to seem technical and arbitrary—nobody ever fought a revolution over the proper method for scheduling Senate floor time—even to those who drafted them. The second situation strikes me as far less plausible.

> they do, how they do it, or why it is necessary to do what they do is not always outwardly apparent. Their actual operation must be assessed, often in sheer wonder, before they are tinkered with, lest great expectations be not only defeated, but mocked by the achievement of their very antithesis.[294]

Of course, the operations of multinational business ventures, the economics and biochemistry of drug manufacturing, and the geopolitics of global terror are all mysterious to the uninitiated. Yet courts consider complicated antitrust claims,[295] intellectual property disputes,[296] and tort claims brought by terror victims.[297] I am skeptical that the inner workings of the U.S. Senate—located across the street from the Supreme Court and made up largely of individuals sharing the legal training and culture of judges and justices—are beyond judicial understanding.

B. The Special Case of Democracy-Enhancing Senate Rules

The above arguments apply to judicial enforcement of any Senate nominations rule, but there is an additional argument that applies specifically to rules like the one proposed in Part I. As discussed above, that rule facilitates majoritarianism and accountability, contributing to the democratic nature of the nominations process.[298] If judicial action could facilitate the Senate's efforts to ensure that Americans' wishes are not vetoed by a small minority when it comes to nominating judges, this weighs powerfully in favor of judicial action.[299]

C. Political Thickets

Another factor to be considered before authorizing any judicial action is judges' strong interest in protecting the judiciary from infection by politics. This interest has led to a judicial preoccupation with avoiding what Justice Felix Frankfurter memorably

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[294] Vander Jagt v. O'Neill, 699 F.2d 1166, 1182 (1982) (Bork, J., concurring). Bork slightly misrepresents Bickel's point. Bickel was not making an argument against judicial meddling in legislative affairs. He was cautioning against overly hasty legal reform. *See* ALEXANDER BICKEL, REFORM AND CONTINUITY 2 (1971) (revised and expanded version of ALEXANDER BICKEL, THE NEW AGE OF POLITICAL REFORM (1968)). Bork himself was not arguing against judicial enforcement of congressional rules, but against jurisdiction over cases involving constitutional challenges to congressional procedures, though his logic would seem to cover interpretation and application cases as well.

[295] *See, e.g.*, United States v. Microsoft Corp., 253 F.3d 34 (D.C. Cir. 2001).

[296] *See, e.g.*, Alice Corp. Pty. Ltd. v. CLS Bank Int'l., 134 S. Ct. 2347 (2014).

[297] *See, e.g.*, Sokolow v. Palestinian Liberation Org., 60 F. Supp. 3d 509 (S.D.N.Y. 2014).

[298] *See supra* notes 27–35 and accompanying text.

[299] *See generally* ELY, *supra* note 262, chs. 4–5; United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938).

called the "political thicket"[300] by declining jurisdiction in cases where the courts' actions are likely to be seen as crassly political. As a matter of legal doctrine, it is not clear that thicket avoidance has much force after the Supreme Court rejected Justice Frankfurter's position in *Baker*.[301] Courts routinely weigh in on the hottest political controversies of the day.[302] Justice Frankfurter may well be silently judging all of this from beyond the grave, but if he is, his successors have managed to ignore him.[303]

Nonetheless, from a policy perspective, Justice Frankfurter's admonition continues to be compelling.[304] Americans' respect for their government and litigants' willingness to obey judicial decrees may both suffer if judges come to be seen as nothing more than politicians who do not face re-election.[305] However, this concern is a matter of public opinion, not legal reasoning, and it should be addressed with a clear focus on the determinants of public opinion. Judicial restraint can be justified as a means of preserving perceived judicial legitimacy only if it actually preserves perceived judicial legitimacy.

There is little evidence for this conclusion. To take one recent example, when the Supreme Court invoked the political question doctrine to avoid deciding the partisan gerrymandering case, *Rucho v. Common Cause*,[306] advocates of limiting gerrymandering criticized both the decision's outcome and Chief Justice Roberts's claim of judicial self-restraint. Former Reagan Administration Solicitor General Charles Fried wrote that nobody should "find consolation in the [C]hief's profession of judicial modesty and abstinence."[307] A pair of law professors writing in Time Magazine argued Roberts's "faux judicial restraint is judicial obfuscation."[308] My

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[300] Colegrove v. Green, 328 U.S. 549, 556 (1946).

[301] 369 U.S. 186, 202 (1962) (distinguishing *Colegrove*). *See also id.* at 252 (Clark, J. concurring).

[302] *See e.g.*, Nat'l Fed'n Indep. Bus. v. Sebelius, 567 U.S. 519 (2012).

[303] Of course, judges may be avoiding issues that strike them as politically fraught without making this explicit. If so, they are doing so inconsistently and without articulating a justificatory principle.

[304] *See generally* CHOPER, *supra* note 262, *passim* (essentially a book-length argument for the Court to manage carefully its political capital).

[305] *See id.* at 203.

[306] 139 S. Ct. 2484, 2485 (2019).

[307] Charles Fried, *A Day of Sorrow for American Democracy*, THE ATLANTIC (July 3, 2019), https://web.archive.org/web/20221015222159/https://www.theatlantic.com/ideas/archive/2019/07/rucho-v-common-cause-occasion-sorrow/593227/ [https://perma.cc/65U5-ED4V].

[308] Guy-Uriel E. Charles & Luis Fuentes-Rohwer, *SCOTUS's Ruling on Gerrymandering Endangers U.S. Democracy*, TIME (July 11, 2019, 7:00 AM), https://time.com/5623638/scotuss-ruling-on-gerrymandering-endangers-us-democracy/ [https://perma.cc/8GE7-2BR3]. I am aware of no systematic study showing whether Americans respond differently to procedural as opposed to substantive dismissals, but anecdotal evidence suggests they do not. When a district court held that the House lacked standing to challenge President Trump's diversion of federal funds to his border wall, the *New York Times* headline summarized, "Trump Wins Ruling in House's Border Wall Suit." Adam Liptak, *Trump Wins Ruling in House's Border Wall Suit* (June 3, 2019), https://www.nytimes.com/2019/06/03/us/poli

argument here is not that the critics were correct; it is that the Court's decision to dismiss on procedural grounds failed to protect it from the claim that the justices were taking sides in a political dispute.

Perhaps more damning, the response to the Court's action was every bit as partisan as if the caption had been *Democrats v. Republicans*. The Republican State Leadership Committee put out a statement praising the Court's majority and characterizing the decision as a repudiation of Democrats.[309] The general counsel of the Republican National Committee wrote a blog post in support of the justices.[310] If the Court majority thought it would avoid the perception of partisanship by relying on the political question doctrine, it badly miscalculated.

More broadly, scholars have noted that the most aggressive attacks on the Supreme Court have often come not because the Court served as a check on the political branches, but because it refused to.[311] To take one of the most explosive early examples, the Court was excoriated for its decision upholding Congress's ability to declare treasury notes legal tender.[312] Of course, in the *Legal Tender Cases* the Court reached the merits, but a procedural dismissal would not have looked much different. In the second *Legal Tender* decision, the Court first noted that "[a]

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tics/trump-house-wall-lawsuit.html [https://perma.cc/EW7P-23UP]. When a suit against Trump under the Foreign Emoluments Clause was dismissed for lack of standing, the headlines were split. *Compare* Darah Gregorian, *Democrats Lack Legal Standing to Sue Trump Over Alleged Emoluments Violations, Appeals Court Rules*, NBC NEWS (Feb. 7, 2020, 10:51 AM), https://www.nbcnews.com/politics/donald-trump/federal-appeals-court-dismisses-trump-emoluments-case-n1132441 [https://perma.cc/R9US-4XXS], *with* Dan Mangan, *Trump Wins Appeal in Case Where Democrats Sued Him for Allegedly Violating Emoluments Clause*, CNBC (Feb. 7, 2020, 3:55 PM), https://www.cnbc.com/2020/02/07/trump-wins-appeal-of-emoluments-clause-lawsuit-by-democrats.html [https://perma.cc/2CDZ-6R8M]. However, Trump was quite clear. "It was a total win," he told reporters. Gregorian, *supra* note 308.

[309] Press Release, RSLC, RSLC Statement on U.S. Supreme Court Decision in Rucho v. Common Cause, June 27, 2019, https://magnoliatribune.com/2019/06/28/rslc-statement-on-u-s-supreme-court-decision-in-rucho-v-common-cause/ [https://perma.cc/6X4Q-SVK9].

[310] Justin Riemer, *Gerrymandering Symposium: Finally Finality from the Supreme Court on Partisan Gerrymandering*, SCOTUSBLOG (June 28, 2019, 2:32 PM), https://www.scotusblog.com/2019/06/gerrymandering-symposium-finally-finality-from-the-supreme-court-on-partisan-gerrymandering/ [https://perma.cc/P2KD-WKPB].

[311] CHARLES WARREN, 1 THE SUPREME COURT IN UNITED STATES HISTORY 5 (revised ed. 1926); CHARLES WARREN, 2 THE SUPREME COURT IN UNITED STATES HISTORY 525–27 (revised ed. 1926); Alan H. Monroe, *The Supreme Court and the Constitution*, 18 AM. POL. SCI. REV. 737, 740 (1924). Critics of judicial power during debate over ratification of the Constitution also worried that courts would enable, not thwart, federal legislators. *See generally Letters of "Brutus"* XII, XV, *in* ALEXANDER HAMILTON, JAMES MADISON & JOHN JAY, THE FEDERALIST: WITH LETTERS OF "BRUTUS" (Terence Ball ed., 2003).

[312] CHOPER, *supra* note 262, at 231–32. No doubt some of the outrage at the second legal tender decision came because the Court had reached a different conclusion just two years and two Grant appointments earlier. *See* Friedman, *Reconstruction's Political Court*, *supra* note 262, at 40–45.

decent respect for a co-ordinate branch of the government demands that the judiciary should presume, until the contrary is clearly shown, that there has been no transgression of power by Congress."[313] It then asked whether it is "our province to decide that [Congress's actions] were beyond the constitutional power of Congress, because we may think that other means to the same ends would have been more appropriate and equally efficient" and concluded "[t]hat would be to assume legislative power, and to disregard the accepted rules for construing the Constitution."[314] Finally, the Court upheld Congress's action.[315]

A political question doctrine opinion might similarly begin with a desire to show "respect [for a] coordinate branch[],"[316] then make clear the Court's obligation to adjudicate and not legislate,[317] and finally decline jurisdiction,[318] leaving Congress's action in place. In the *Legal Tender* opinion, the Court responded to separation of powers concerns by interpreting the Constitution deferentially, and the response was outrage. In a political question case, the Court would respond to the same concerns by declining to interpret the Constitution at all, with the same ultimate disposition. I see no reason to expect a different reaction from the public.[319]

Even if courts could avoid appearing political by declining to decide cases on the merits, there is no reason for them to be especially wary of Senate rules cases. While these cases will generally pit one set of political actors against another, that does not distinguish them from many of the cases currently decided by courts. If history is any guide, Senate rules cases have one benefit that many political controversies do not: political actors have probably been on both sides of whatever issue

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313 Legal Tender Cases, 79 U.S. 457, 531 (1871).

314 *Id.* at 542.

315 *Id.* at 554.

316 Gilligan v. Morgan, 413 U.S. 1, 8 (1972).

317 *Id.* at 10.

318 *Id.* at 12.

319 A recent paper by political scientists Dino P. Christenson and David M. Glick supports this conclusion. *See generally* Dino P. Christenson & David M. Glick, *Chief Justice Roberts's Health Care Decision Disrobed: The Microfoundations of the Supreme Court's Legitimacy*, 59 AM. J. OF POL. SCI. 403 (2015). Christenson and Glick find that Americans' perception of the Supreme Court's legitimacy in part reflects their ideological agreement with high profile Court opinions, *id.* at 410, suggesting that the courts may want to avoid issuing such decisions when they will necessarily disagree with significant segments of the public. On the other hand, the authors also find that Americans' perception of the Court's legitimacy is even more sensitive to evidence that the Court thinks strategically about public perception. When exposed to a news article reporting that Chief Justice Roberts may have changed his position in *National Federation of Independent Business v. Sebelius*, 567 U.S. 519 (2012), to reduce public backlash, Americans significantly lowered their rating of the Court's legitimacy. Christenson & Glick, *supra*, at 410. If Americans perceive the courts' explicit efforts to avoid political questions for legitimacy reasons as an indication that they are acting politically and not legalistically, a political question opinion may reduce judicial legitimacy more than a straightforward ruling on the merits.

is in dispute. A ruling against the nuclear option in 2013 would have been seen as favoring Republicans.[320] The same ruling in the early 2000s would have been a Democratic victory.[321] It is harder to see a judicial opinion as purely partisan if partisans' views about the opinion fluctuate with the election returns.[322]

By enforcing nominations rules, the courts can also achieve something they rarely, if ever, achieve in other cases: they can help to improve a nominations process that increasingly brings their work into question. If Americans come to believe that the makeup of the bench is determined by whichever political party is willing to violate Senate norms most flagrantly, the result can only be bad for the judiciary. Justice Frankfurter was right when he wrote that "[t]he Court's authority—possessed of neither the purse nor the sword—ultimately rests on sustained public confidence in its moral sanction."[323] If the courts want to retain the public's confidence, they should help the Senate build a nominations process that justifies that confidence.

D. Biased Courts

Another potential counter to my argument starts with the premise not that courts could be politicized, but that they already have been.[324] If courts are biased, according to this argument, little is gained and much may be lost by allowing them to enforce Senate rules. A Republican judiciary will be just as unlikely to enforce the rules against a Republican Senate as would the Senate itself. Worse, while the American people can replace Senate leadership, they cannot so easily replace the judiciary. For that reason, judicial bias in Senate rules enforcement may be more difficult to fix than Senate bias.

Even if we accept that the judiciary has been, in a sense, politicized, courts still have two advantages over the Senate when it comes to rules enforcement. First, at

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[320] *See* Paul Kane, *Reid, Democrats Trigger 'Nuclear' Option; Eliminate Most Filibusters on Nominees*, WASH. POST (November 21, 2013), https://www.washingtonpost.com/politics/senate-poised-to-limit-filibusters-in-party-line-vote-that-would-alter-centuries-of-precedent/2013/11/21/d065cfe8-52b6-11e3-9fe0-fd2ca728e67c_story.html [https://perma.cc/EQP5-UB9T]. Nothing in my argument suggests courts should or could have invalidated the nuclear option. I use the nuclear option example only as an illustration of the general principle that where the parties stand on procedural matters tends to depend on where they sit.

[321] *See* Richard J. Durbin, *No Constitutional Right to a Rubber Stamp*, 39 U. RICH. L. REV. 989, 992–98 (2005).

[322] The fact that the parties frequently switch positions on questions of procedure and face a coordination problem in establishing procedural rules suggests that Senate rules present a particularly appropriate area for courts to provide authoritative settlement, a function comparatively unlikely to generate controversy or threats to judicial legitimacy. *See* Larry Alexander & Frederick Schauer, *On Extrajudicial Constitutional Interpretation*, 110 HARV. L. REV. 1359, 1371 (1997); Robert Post & Reva Siegel, Roe *Rage: Democratic Constitutionalism and Backlash*, 42 HARV. C.R.-C.L. L. REV. 373, 378 (2007).

[323] *Baker*, 369 U.S. at 267 (Frankfurter, J., dissenting).

[324] *See* Bronsther & Krishnamurthi, *supra* note 4, at 113.

the time when a Senate nominations rule is adopted—and, to a lesser extent, at the time when the majority decides to violate such a rule—it may be difficult to predict what kind of judges will hear any case arising from a rules violation. The overall tilt of the judiciary has changed repeatedly and could change in unexpected ways going forward. Further, even if the judiciary generally tilts in a particular direction, litigants in a Senate rules case could still draw a district court judge and an appellate panel with very different views than the judiciary as a whole.[325] This should deter rule violations and make rulemaking more achievable, at least relative to a regime in which the Senate majority is always the final arbiter in any rules dispute.

Even if every judge had exactly the same bias, judicial enforcement could be an improvement over the status quo. It is one thing to say that judges can be biased, an entirely different thing to say that they are more biased than the Senate majority, which will generally be deciding a dispute to which it is a party. Even the harshest critics of judicial bias do not generally argue defendants should simply be allowed to judge their own conduct.

E. Use the Filibuster Instead

One final objection relates to an alternative means for enforcing Senate rules. The filibuster gives Senate minorities the ability to punish the majority for rules violations.[326] A critic of the argument laid out in this Article could suggest that, rather than allowing another branch of government to referee fights for the Senate, the Senate should simply restore and protect the filibuster as it stood prior to 2013. This would allow the Senate to police its own affairs by making Senate majorities think twice before violating Senate rules.

First, it is not clear that the Senate could restore the filibuster to its pre-2013 state. The fact that the nuclear option has already been used twice since 2013 suggests that the first detonation may have made it easier for future majorities to go nuclear when the stakes feel high enough.[327] No statement by the Senate purporting

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[325] It is easier to predict who will hear a case if it is heard by the Supreme Court or a circuit court sitting en banc. However, a Senate majority anticipating future litigation over a rules violation cannot have confidence it will receive en banc or certiorari review. *See* ADMIN. OFF. U.S. CTS., 2020 ANNUAL REPORT OF THE DIRECTOR: JUDICIAL BUSINESS OF THE UNITED STATES COURTS 66 (Table B-10) (35 cases out of 30,071 resolved on the merits were heard en banc by U.S. circuit courts); *Frequently Asked Questions*, SUP. CT. U.S., https://www.supremecourt.gov/about/faq_general.aspx [https://perma.cc/8UNN-8D5K] (last visited Mar. 1, 2023) ("The Court receives approximately 7,000–8,000 petitions for a writ of certiorari each Term. The Court grants and hears oral argument in about 80 cases.").

[326] *About Filibusters and Cloture | Historical Overview*, U.S. SENATE, https://www.senate.gov/about/powers-procedures/filibusters-cloture/overview.htm [https://perma.cc/ASC3-5C6C] (last visited Mar. 1, 2023).

[327] *See* Matt Flegenheimer, *Senate Republicans Deploy "Nuclear Option" to Clear Path for Gorsuch*, N.Y. TIMES (April 6, 2017), https://www.nytimes.com/2017/04/06/us/politics

to protect the filibuster going forward could possibly be clearer than the provision already in the Senate standing rules, which requires a two-thirds vote to repeal any rule, including the rule governing cloture.[328] Yet that provision was ignored, and both political parties have made statements indicating the rule could always be superseded by Senate action inconsistent with it.[329] This particular genie may be unwilling to go quietly back into its bottle.

Moreover, supermajority cloture came at a steep, and arguably unnecessary, price. Under a sixty vote cloture threshold, a nominee supported by a popularly elected president and senators representing eighty-eight percent of the American people could nonetheless be blocked.[330] While a filibuster might be justified when the majority violates a Senate rule, supermajority cloture also allows for filibusters motivated by pure partisan animosity, ideological rigidity, or political grandstanding. In turn, filibusters are an imperfect tool for rules enforcement. There is no reason to think that allowing forty-one senators to declare and punish rules violations will lead to consistent and fair enforcement, given the political incentives that senators face[331] and the skills they develop (or fail to develop) in their work.[332] Finally, one rationale for judicial enforcement is that senators may be more likely to accept judgments that come not from the other political party, but from a judge.[333] Rules enforcement-by-filibuster does not provide this benefit.

CONCLUSION

The U.S. Senate faces a challenge. If the current pattern of tit-for-tat norms breaking around nominations continues, an institution built on comity and collegiality

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/neil-gorsuch-supreme-court-senate.html [https://perma.cc/ZTJ5-X3KN]; Burgess Everett, *Republicans Trigger "Nuclear Option" to Speed Trump Nominees*, POLITICO (April 3, 2019, 5:52 PM), https://www.politico.com/story/2019/04/03/senate-republicans-trigger-nuclear-option-to-speed-trump-nominees-1253118 [https://perma.cc/YQ5G-KTJK].

[328] SENATE COMM. ON RULES & ADMIN., STANDING RULES OF THE SENATE, S. Doc. No. 113-18, at R. V ¶ 2; XXII ¶ 2.

[329] *See* Cornyn, *supra* note 24, at 194–206; Dauster, *supra* note 12, at 649–56.

[330] This is because there are forty-one states whose combined population equals just 13 percent of the American people. U.S. CENSUS BUREAU, *Annual Estimates of the Resident Population for the United States, Regions, States, and Puerto Rico: April 1, 2010 to July 1, 2019* (2019), https://www.census.gov/programs-surveys/popest/technical-documentation/research/evaluation-estimates/2020-evaluation-estimates/2010s-state-total.html [https://perma.cc/CX5Z-PH4Y].

[331] Politicians would need unusual fortitude to tell their donors and primary voters that the other party's officials have done nothing wrong. *See generally* SEAN THERIAULT, PARTY POLARIZATION IN CONGRESS (2008).

[332] *See* CHOPER, *supra* note 262, at 68 (elected officials unsuited to "deliberative, contemplative [and] dispassionate decisionmaking").

[333] *See* Fong, *supra* note 37.

may discover it cannot function when those values prove insufficient to regulate senators' behavior. The cold logic of this degenerative process—do unto others before others may do unto you—both fuels and is fueled by partisan polarization, and it does not appear to be going away. If our system is committed to both democracy and governance, courts should allow the Senate the tools it needs to arrest its slide into dysfunction.